No. 87-1729-CFY Title: Caplin & Drysdale, Chartered, Petitioner

Status: GRANTED

United States

Docketed: April 11, 1988 Court: United States Court of Appeals for the Fourth Circuit

See also:

88-454

Counsel for petitioner: Lockwood, Peter Van N.

Counsel for respondent: Solicitor General

Entry		Date	e 1	Not	te Proceedings and Orders
1	Feb	23	1988		Application for extension of time to file petition and order granting same until April 11, 1988 (Rehnquist, February 26, 1988).
2	2	11	1000	-	Petition for writ of certiorari filed.
			1988		Appendix of petitioner Caplin & Drysdale, Chartered filed.
5			1988		Order extending time to file response to petition until June 9, 1988.
6	Jun	9	1988		Brief of respondent United States in opposition filed.
7	Jun	9	1988		Brief amicus curiae of American Bar Association filed.
8			1988		DISTRIBUTED. June 29, 1988
9					Reply brief of petitioner Caplin & Drysdale, Chartered filed.
11	Sep	19	1988		REDISTRIBUTED. September 26, 1988
12					Supplemental brief of respondent United States filed.
13			1988		REDISTRIBUTED. November 4, 1988
14	Oct	25	1988	X	Supplemental brief of petitioner Caplin & Drysdale, Chartered filed.
15	Nov	7	1988		Petition GRANTED. The case is set for oral ergument in tandem with No. 88-454, United States v. Monsanto.
17	Dec	14	1988		Order extending time to file brief of petitioner on the merits until January 5, 1989.
18	Dec	26	1988	G	Application (A88-513) by National Association of Criminal Defense Lawyers, et al. to file a in excess of page limits, submitted to The Chief Justice.
24	Dec	27	1988		Brief amici curiae of Natl. Assn. of Criminal Defense Lawyers, et al. filed.
19	Dec	30	1988		Application (A88-513) granted by the Chief Justice, allowing a maximum of 50 pages.
20	Jan	5	1989		Brief amicus curiae of American Bar Association filed. VIDED.
21	Jan	5	1989		Brief of petitioner Caplin & Drysdale, Chartered filed.
22	Jan	5	1989		Joint appendix filed.
. 23	Jan	6	1989		Record filed.
,				*	original, 4 vol
28	Feb	1	1989		Order extending time to file brief of respondent on the merits until February 22, 1989.
25	Feb	3	1989		SET FOR ARGUMENT TUESDAY, MARCH 21, 1989. (1ST CASE)
26	-		1989		Brief amicus curiae of California filed. VIDED.
29	~ ~		1989		Brief amicus curiae of Appellate Committee of the CA DAs Assn. filed. VIDED.
30	Feb	22	1989		Order further extending time to file brief of respondent

No. 87-1729-CFY

Date

36 Mar 21 1989

Note

ARGUED.

Entry

on the merits until February 27, 1989.

31 Feb 22 1989 Brief amicus curiae of Eugene R. Anderson, Esq. filed.

32 Feb 27 1989 Brief of respondent United States filed.

33 Mar 1 1989 CIRCULATED.

34 Mar 10 1989 X Supplemental brief of respondent United States filed. VIDED.

35 Mar 14 1989 X Reply brief of petitioner Caplin & Drysdale, Chartered filed.

Proceedings and Orders

87-1729

No. 87-\_\_\_

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IN THE

### Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,

Petitioner,

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

\*Peter Van N. Lockwood Graeme W. Bush Caplin & Drysdale, Chartered One Thomas Circle, N.W. Washington, D.C. 20005 (202) 862-5000

\*Counsel of Record

### QUESTIONS PRESENTED

In 1984, Congress amended the forfeiture provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. (Supp. IV 1986) § 853, to include a "relation back" provision, vesting title to forfeited assets in the government upon commission of the underlying crime. This case presents the following questions:

- 1. Whether Congress in the 1984 amendments intended to authorize the forfeiture of arm's-length attorney fees paid to a lawyer in good faith by a criminal defendant for the purpose of securing representation against the criminal charges upon which the forfeiture count is based.
- 2. If the first question is answered in the affirmative, whether the 1984 amendments are unconstitutional under the Sixth Amendment, by impairing the defendant's qualified right to counsel of choice, or under the Fifth Amendment, by destroying the balance of forces between the government and the accused.

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#### Table of Authorities Continued Page United States v. Bailey, 666 F. Supp. 1275 (E.D. 9 Ark. 1987) ..... United States v. Bassett, 632 F. Supp. 1308 (D. Md. 7 1985) ..... United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) ...... 14 United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986) ..... 9 United States v. Figueroa, 645 F. Supp. 453 (W.D. 9 Pa. 1986) ..... United States v. Flanagan, 679 F.2d 1072 (3d. Cir. 1982), rev'd, 465 U.S. 259 (1984) ..... 13 United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984), aff'd on other grounds, 471 U.S. 773 (1985) ..... 14 United States v. Harvey, Cr. No. 85-00224-A (E.D. 7 Va. 1986) ..... United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985) ..... 6.9 United States v. Inman, 483 F.2d 738 (4th Cir. 13 1973), cert. denied, 416 U.S. 988 (1974) ...... United States v. Jones, 837 F.2d 1332 (5th Cir. 1988) ...... 10,11-12 United States v. Kirby, 74 U.S. (7 Wall.) 482 22 (1868) ..... United States v. Leavitt. 608 F.2d 1290 (9th Cir. 1979) ..... 14 United States v. Madeou, Cr. No. 86-0377 (D.D.C. 9 Oct. 2, 1987) ..... United States v. Mageean, 649 F. Supp. 820 (D. Nev. 1986), aff'd, 822 F.2d 62 (9th Cir. 21 1987) ..... United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (reh'g granted Jan. 29, 1988, argued

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ABA Mo	del Rules of Professional Conduct, Rules (1)(2), 1.7(b), 1.8(j)	24
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	4)	3,21
	98-225, 98th Cong., 2d Sess. (1984) 3,17	7,18,21
Ame	ill, Minor and Technical Criminal Law endments Act of 1988, § 149, Senate Com- ee on the Judiciary, 100th Cong., 2d Sess.,	
	7, 1988)	26
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Cloud, For	orfeiting Defense Attorneys' Fees: Applying institutional Role Theory to Define Individ-Constitutional Rights, 1987 Wis. L. Rev.	9
Fossum, Clien	Criminal Forfeiture and the Attorney- nt Relationship: Are Attorneys' Fees Up for os?, 39 Sw. L.J. 1067 (1986)	10
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feitu	iminal Procedure IV: Attorneys' Fees For- re and Subpoenaing Defendants' Attorneys, Ann. Surv. Am. Law 335 (1986)	10
Fees: sario	RICO and the Forfeiture of Attorneys's Removing the Adversary from the Adversal System?, 62 Wash. L. Rev. 201	
(1987	7)	10

Table	of	Authorities	Continued

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Comment, Today's RICO and Your Disappearing Legal Fee, 15 Cap. U.L. Rev. 59 (1985)	10
Note, Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants, 61 N.Y.U.L. Rev. 124 (1986)	9
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Note, Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?, 62 Notre Dame L. Rev. 734 (1987)	9
Note, Forfeitability of Attorney's Fees Traceable as Proceeds from a RICO Violation under the Comprehensive Crime Control Act of 1984, 32 Wayne L. Rev. 1499 (1986)	10
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### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

CAPLIN & DRYSDALE, CHARTERED,

Petitioner,

V.

UNITED STATES OF AMERICA

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Caplin & Drysdale, Chartered, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals en banc (App., infra, 1a-29a<sup>1</sup>) is reported at 837 F.2d 637. The opinion of the court of appeals panel (App., infra, 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (App., infra, 81a-92a) is reported at 631 F. Supp. 1191.

### JURISDICTION

The judgment of the court of appeals en banc (App., infra, 1a) was entered on January 11, 1988. On February

<sup>&</sup>quot;App." refers to the separately bound appendix to this petition for a writ of certiorari.

26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, and the relevant provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. § 853, are set out in a statutory appendix (App., *infra*, 93a-103a).

### STATEMENT

1. Congress enacted the Continuing Criminal Enterprise (CCE) statute in 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265, originally codified at 21 U.S.C. (1970 ed.) § 848. Since its enactment, the CCE statute has contained an in personam forfeiture penalty that is imposed as a part of the sentence of a defendant convicted of a CCE violation. The forfeiture extends to proceeds of the CCE violation and to any property affording an "interest in" or "source of influence over" the illegal enterprise (21 U.S.C. (Supp. IV 1986) § 853(a)(3)). The Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. (Supp. IV 1986) § 1963, contains similar forfeiture provisions.<sup>2</sup>

Congress amended the forfeiture provisions of CCE and RICO in 1984 to enhance the government's ability to prevent defendants from evading the forfeiture penalty by transferring assets before conviction. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 302, 2301, 98

Stat. 2044, 2192-93 (the 1984 Act), codified at 18 U.S.C. (Supp. IV 1986) § 1963 (RICO) and 21 U.S.C. (Supp. IV 1986) § 853 (CCE). The 1984 Act added a provision, commonly called the "relation back" provision, that vests title to forfeitable assets in the government at the time of the criminal violation. See 21 U.S.C. (Supp. IV 1986) § 853(c). A third-party transferee of forfeitable assets can defeat forfeiture by proving at a post-conviction hearing that the transfer was a bona fide exchange for value and that he was, at the time of the transfer, "reasonably without cause to believe that the property was subject to forfeiture." Ibid.; see 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). Congress also amended the CCE restraining-order provisions to permit the government to obtain an ex parte order, based solely on the indictment, restraining a defendant from transferring any asset alleged to be forfeitable. 21 U.S.C. (Supp. IV 1986) § 853(e).

Congress explained that the purpose of the 1984 Act was "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions." S. Rep. 98-225, 98th Cong., 2d Sess. 200-201 (1984). Congress stated that the relation-back provision was aimed at "improper pre-conviction transfers" (id. at 196, 197) and at "improper disposition of forfeitable assets" (id. at 194). Noting that the 1984 Act "should not operate to the detriment of innocent bona fide purchasers of the defendant's property" (id. at 201), Congress explained that the exception for good-faith transferees "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (id. at 209 n.47). Referring to the amended restraining-order provision, the House Report stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt.1, 98th Cong., 2d Sess. 19 n.1 (1984).

<sup>&</sup>lt;sup>2</sup> While this case concerns a CCE prosecution, the RICO forfeiture provisions are substantially identical to the CCE forfeiture provisions, and the courts have interpreted them similarly. See App., infra, 33a n.1.

2. Caplin & Drysdale, Chartered, was retained by Christopher Reckmeyer in the summer of 1983 in connection with a grand jury investigation in the Eastern District of Virginia (App., infra, 4a). At the time Caplin & Drysdale undertook the representation, it believed the investigation to involve possible violations of the criminal tax laws. Eighteen months later, the investigation culminated in an indictment against Reckmeyer and 25 other individuals for 48 counts of tax and drug crimes (App., infra, 82a; C.A. App. 48-50<sup>3</sup>).

The indictment, handed down on January 15, 1985, included a CCE count and sought forfeiture of virtually all of Reckmeyer's assets (App., infra, 4a). Specifically, the CCE count sought to forfeit "any profits" and any property affording "a source of influence over [the] enterprise, including but not limited to" a long list of assets (C.A. App. 54). That list contained generic descriptions of the assets to be forfeited, such as "any and all possessions" (id. at 59) and "any and all personal and/or corporate ownership interest . . . in any monies" (id. at 62). The day before the indictment was filed, the government sought and obtained an ex parte order restraining the transfer of assets covered by the indictment, specifically including all "currency" of Reckmeyer. App., infra, 4a, 82a; C.A. App. 91.

During the investigation preceding Reckmeyer's indictment, Caplin & Drysdale had tendered bills and been paid for its legal services at the standard hourly rates for the attorneys involved. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale \$26,445 for services rendered and costs incurred through that date (App., infra, 82a; C.A. App. 123). On January 14, 1985, Caplin & Drysdale received two checks from Reckmeyer, each in the amount of \$5,000, in partial payment of amounts due on the out-

standing bills. These checks were deposited, but they subsequently were returned unpaid to Caplin & Drysdale because of the restraining order (C.A. App. 123, 129-130). On January 25, 1985, just prior to his surrender to authorities, Reckmeyer paid Caplin & Drysdale \$25,480 in cash (App., infra, 39a). The firm notified the district court of its receipt of these funds, which were then deposited in a separate escrow account pending further order of the court. At Reckmeyer's request, Caplin & Drysdale continued to represent him after the indictment. Ibid.

In accordance with Reckmeyer's request, Caplin & Drysdale subsequently filed a motion seeking modification of the restraining order to permit the payment of attorneys fees. App., infra. 82a. To meet the trial schedule set by the district court, the firm found it necessary to begin trial preparations before this motion could be decided. On March 14, 1985, the day before the motion was to be heard. Reckmeyer pled guilty to three counts of the 48count indictment, including the CCE count on which the forfeiture allegations were based. Ibid. At the hearing the next day, the district court denied the motion for modification of the restraining order, citing Reckmeyer's guilty plea. The court stated, however, that Caplin & Drysdale could raise the issue of forfeitability of attorneys fees, on its own behalf, in the context of a third-party petition against forfeited assets. Reckmeyer was sentenced on May 17, 1985, to 17 years in prison without parole, and was ordered to forfeit virtually all his assets, including the cash held in escrow and the bank accounts on which the dishonored checks to Caplin & Drysdale had been drawn. Id. at 82a-83a.

Caplin & Drysdale filed a claim in post-conviction proceedings under 21 U.S.C. (Supp. IV 1986) § 853(n) to an interest in the forfeited property in the amount of \$170,513 (App., infra, 5a, 83a), representing unpaid fees and expenses owed to the firm for legal services rendered to

<sup>&</sup>lt;sup>3</sup> "C.A. App." refers to the joint appendix filed in the Court of Appeals.

Reckmeyer both before and after his indictment, plus the \$25,480 in cash and \$10,000 in dishonored checks received for services rendered prior to the indictment. The government conceded the reasonableness and legitimacy of Caplin & Drysdale's fees (C.A. App. 183), but argued that the "relation back" provision vested prior title to Reckmeyer's assets in the government and prevented payment of any fees.

The district court rejected the government's contention and ordered it to pay \$170,513 to Caplin & Drysdale out of Reckmeyer's forfeited assets (App., infra, 92a). The court found that Caplin & Drysdale "was a good faith provider of services for value" (id. at 83a) and held that Congress had not intended the 1984 Act to encompass the forfeiture of bona fide attorneys fees. A contrary interpretation of the statute, the district court concluded, would violate a defendant's Sixth Amendment rights by preventing him from retaining counsel of his choice (id. at 88a-92a). The interpretation urged by the government, the district court further concluded, would violate the Due Process Clause of the Fifth Amendment by creating conflicts between defense counsel and the criminal defendant that "would undermine the adversary system" (id. at 91a). In so holding, the court followed the rulings of other district courts, which similarly had concluded that "attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions." Id. at 86a, citing United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985).

3. A panel of the Fourth Circuit unanimously affirmed, albeit on constitutional rather than statutory grounds. App., infra, 41a-77a. While acknowledging that "a central

concern behind the relation-back provisions was to void sham and fraudulent transfers" (id. at 49a), the panel concluded that the statutory language was not so narrowly confined; it accordingly ruled that the 1984 Act encompassed attorneys fees, even when paid in good faith and at arm's length. The panel agreed with the district court, however, that this interpretation of the statute rendered it unconstitutional (id. at 70a):

[T]o the extent the Act authorizes freeze orders and forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the [S]ixth [A]mendment right to counsel of choice.

The panel acknowledged that the right to counsel of choice is "qualified" and must be balanced against countervailing government interests (id. at 66a-70a). But it concluded that the government's asserted interests—deterrence, preserving property for forfeiture, and depriving convicted persons of their economic power—did not outweigh "the primary right to representation by privately retained counsel of choice" (id. at 67a).

4. The Fourth Circuit granted rehearing en banc and, by a 7-4 vote, overturned the panel decision on the constitutional issues. The en banc court found no need to

<sup>4</sup> The instant case was consolidated in the Fourth Circuit for argu-

ment with two other cases raising related issues concerning pre-trial restraint of a defendant's use of assets to pay bona fide attorneys fees. In United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1985), the district court exempted certain of a defendant's assets from potential forfeiture in order to enable him to pay his attorneys. In United States v. Harvey, Cr. No. 85-00224-A (E.D. Va. 1986), the defendant's chosen counsel initially refused to enter an appearance because the government's restraining order prevented payment of attorneys fees; the district court ultimately appointed that law firm to represent the defendant under the Criminal Justice Act. Neither of these other cases was considered by the Fourth Circuit en banc.

consider how the right to counsel of choice is "qualified," stating that this constitutional right "simply does not apply at all in the fee forfeiture context" (App., infra, 11a). The majority stated that "[t]he right to counsel of choice belongs only to those with legitimate assets," and it concluded that a criminal defendant should be deemed to have no legitimate assets, even prior to conviction, so long as "the government contests the legal ownership of the assets" (id. at 12a). This conclusion was founded on the statute's "relation back" provision, which the majority analyzed as a property-law concept rather than as a punitive element of criminal in personam forfeiture. "[Ilf [a defendant] has no uncontested assets available for securing private counsel," the majority concluded, the availability of an appointed attorney is sufficient to satisfy his Sixth Amendment rights (id. at 14a).

The majority acknowledged that "[f]ee forfeiture does indeed raise many complex problems concerning access to defense counsel, the attorney-client privilege, and the resource needs of public defenders" (App., infra, 19a). Having failed to discern any constitutional right at issue, however, the majority dismissed these concerns as mere questions of policy properly addressed to Congress (id. at 19a-22a). Indeed, the majority asserted that Congress had already discerned a "compelling public interest" in stripping defendants, in advance of trial and conviction, of "the ability to command high-priced legal talent" (id. at 21a).

### REASONS FOR GRANTING THE PETITION

The Fourth Circuit has decided an important question concerning the impact of the criminal forfeiture penalty on retention of defense counsel in a manner that conflicts with decisions of the Fifth and Second Circuits. Under the Fourth Circuit's en banc decision, whenever the government seeks forfeiture under CCE or RICO of all of a defendant's assets, the defendant as a practical matter will be prevented by the indictment alone from hiring defense

counsel of his choice to defend him against the criminal charges that are the basis of the unproven forfeiture claim. This interference with the retention of private counsel in CCE and RICO prosecutions has caused widespread confusion and uncertainty among criminal defense counsel and the courts, as evidenced by the numerous lower court decisions addressing the issue.<sup>5</sup> The issue is of great impor-

The commentators who have addressed the issue have reached similarly diverse conclusions, but none doubts that genuine issues exist. Some conclude the statute should be read to exclude attorneys fees. See Note, Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?, 39 Stan. L. Rev. 663 (1987); Cloud, Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights, 1987 Wis. L. Rev. 1; Note, Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants, 61 N.Y.U.L. Rev. 124 (1986). Others conclude that while the broad language of the statute emcompasses attorneys' fees, as so interpreted it is unconstitutional. See Note, Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?, 62 Notre Dame L. Rev. 734 (1987); Note, Attorney Fee Forfeiture, 86 Colum. 1021 (1986); Note, Forfeiture of Attorneys' Fees: A Trap for the Unwary, 88 W. Va. L.

<sup>&</sup>lt;sup>5</sup> Many district courts have held that the statute must be read to exempt from forfeiture sufficient assets to enable a defendant to retain an attorney to defend the criminal charges. United States v. Madeoy, No. 86-0377 (D.D.C. Oct. 2, 1987) (WESTLAW, Allfeds Database); United States v. Truglio, 660 F. Supp. 103 (N.D. W. Va. 1987); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); see also United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), modified, 809 F.2d 249 (1987). Other courts have concluded that the statute does not exempt attorneys fees and that it is not unconstitutional to require a defendant to forfeit assets that would otherwise be paid to an attorney. United States v. Bailey, 666 F. Supp. 1275 (E.D. Ark. 1987). See also In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Payden), 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y. 1985) (dictum), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985).

tance to the administration of justice and should be resolved promptly by this Court.

1. The 7-4 en banc opinion of the Fourth Circuit, which is consistent with a recent 2-1 decision of the Tenth Circuit (United States v. Nichols, Nos. 87-1459, 87-1743 (Mar. 10, 1988)), is squarely in conflict with the Fifth Circuit's decisions in United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), modified, 809 F.2d 249 (1987), and United States v. Jones, 837 F.2d 1332 (5th Cir. 1988). The decision below also conflicts, either directly or in fundamental principle, with the Second Circuit's recent 2-1 decision in United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (reh'g granted Jan. 29, 1988, argued Mar. 30, 1988).

The Fifth Circuit concluded in *Thier* that the CCE forfeiture provisions were not intended to prevent the payment of legitimate attorneys fees incurred in the defense

Rev. 825 (1986). Another group of commentators suggests that additional procedural safeguards should be employed in applying the statutes to bona fide attorneys' fees. See Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 Va. L. Rev. 493 (1986); Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up for Grabs?, 39 Sw. L.J. 1067 (1986); Pate, Payment of Attorneys' Fees with Potentially Forfeitable Assets, 22 Crim. L. Bull. 326 (1986); Note, Forfeiture of Attorneys' Fees Under RICO and CCE, 54 Fordham L. Rev. 1171 (1986); Note, Forfeitability of Attorney's Fees Traceable as Proceeds from a RICO Violation under the Comprehensive Crime Control Act of 1984, 32 Wayne L. Rev. 1499 (1986); Comment, Today's RICO and Your Disappearing Legal Fee, 15 Cap. U.L. Rev. 59 (1985).

See also Note, The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees, 19 U. Mich. J.L. Reform 1199 (1986); Viles, Criminal Procedure IV: Attorneys' Fees Forfeiture and Subpoenaing Defendants' Attorneys, 1986 Ann. Surv. Am. Law 335 (1986); Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 Am. Crim. L. Rev. 747 (1985); Comment, RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary from the Adversarial System?, 62 Wash. L. Rev. 201 (1987).

of criminal charges, and that a contrary interpretation would violate a defendant's Sixth Amendment rights (801 F.2d at 1470-1475). That conclusion was reached in the context of a pre-trial challenge to an ex parte restraining order that barred the defendant from using his assets to employ private counsel. The Fifth Circuit held that such an order can be extended beyond ten days (see 21 U.S.C. (Supp. IV 1986) § 853(e)(2)) only if the government prevails at an evidentiary hearing in which the district court considers, among other things, the order's effect on the defendant's ability to retain a lawyer (801 F.2d at 1469, 1474). Even if the government prevails at such a preliminary evidentiary hearing, moreover, the Fifth Circuit found "no indication in the statute or the legislative history that Congress intended to exclude attorneys from bringing a third-party claim for a reasonable attorneys fee against potentially forfeitable assets in a post-conviction hearing" (id. at 1474). The court stated that a defendant's attorney may demonstrate at such a post-conviction hearing that "he rendered legitimate services and is entitled to payment from the forfeited assets," and the court emphasized that the attorney's "necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services" (ibid).

In United States v. Jones, 837 F.2d 1332 (5th Cir. 1988), the Fifth Circuit subsequently approved the precise post-conviction procedure for recovering attorneys fees that was outlined in Thier and that was followed by petitioner in the instant case. The Fifth Circuit in Jones affirmed a district court's modification of the post-conviction forfeiture order to release forfeited assets to pay the legitimate attorneys fees of criminal defense counsel. The court of appeals specifically reaffirmed its holding in Thier that "an attorney may demonstrate in a post-conviction hearing that he rendered legitimate services and is entitled to

payment from the forfeited assets." Jones, 837 F.2d at 1335, quoting Thier, 801 F.2d at 1474.

The Fourth Circuit's en banc decision also conflicts. either directly or in fundamental principle, with the Second Circuit's recent decision in United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987). Although the Second Circuit majority agreed with the Fourth Circuit that a defendant has no constitutional right to pay retained defense counsel out of otherwise forfeitable assets, it held that the 1984 Act violates the Sixth Amendment to the extent it authorizes a restraining order, based solely on an indictment, where the defendant claims that he is unable to retain defense counsel without use of his restrained assets. The Second Circuit ruled (id. at 84) that the defendant's Sixth Amendment right to counsel of choice requires the government to demonstrate, at a pretrial evidentiary hearing, that it is likely to prevail on the merits of the underlying criminal charges and that the contested assets are likely to be forfeited upon the defendant's conviction. Id. at 83-84. The court ruled (id. at 84) that if the government fails to demonstrate likelihood of success on the merits at such a hearing, the government would thereafter be foreclosed by the Sixth Amendment from seeking a post-conviction forfeiture of attorneys fees, even though defense counsel would have been aware of the government's forfeiture allegations and hence would be unable to satisfy the "reasonably without cause to believe" standard of 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). Judge Oakes, in dissent, would have followed the panel opinion of the Fourth Circuit in the instant case and declared the 1984 Act unconstitutional to the extent it applies to prevent the payment of defense counsel out of assets alleged by the government to be forfeitable.

These decisions of the Fifth and Second Circuits cannot be reconciled with the decision below. The Fourth Circuit refused even to consider the respective interests of the defendant and the government, holding that a defendant's qualified right to counsel of choice "simply does not apply at all in the fee forfeiture context" (App., infra, 11a). In contrast to the Fifth and Second Circuits, therefore, the Fourth Circuit has squarely held that the 1984 Act authorizes the forfeiture of attorneys fees and that such forfeiture implicates no rights of a defendant under the Sixth Amendment.

2. The Fourth Circuit's holding to this effect is contrary to a long line of decisions, beginning with this Court's decision in Powell v. Alabama, 287 U.S. 45, 53 (1932), which have held that a fundamental component of the Sixth Amendment right to counsel is the right to use one's assets to retain counsel of one's choice to defend against criminal charges. The right is "qualified" by the obvious limitation that a defendant without assets is unable to exercise it. It is qualified further in that certain government interferences with a defendant's choice of counsel have been permitted in the interest of the orderly administration of justice. Whether such interference with the

<sup>6</sup> For example, the courts have denied continuances where a defendant seeks to change counsel on the eve of trial (Unger v. Sarafite, 376 U.S. 575, 589 (1984); Sampley v. Attorney General of North Carolina, 786 F.2d 610, 612-613 (4th Cir.), cert. denied, 106 S. Ct. 3305 (1986); United States v. Inman, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974)); the courts have refused to permit a defendant to be represented by someone who is not admitted to the bar (United States v. Schmitt, 784 F.2d 880, 882 (8th Cir. 1986)); and the courts have refused to permit counsel to represent more than one defendant in a criminal case where conflicts exist between the clients (United States v. Wheat, 813 F.2d 1399 (9th Cir.), cert. granted, No. 87-4 (Oct. 5, 1987) (argued Mar. 2, 1988); United States v. Flanagan, 679 F.2d 1072 (3d. Cir. 1982), rev'd, 465 U.S. 259 (1984); United States v. Snyder. 707 F.2d 139, 145 (5th Cir. 1983); United States v. Provenzano, 620 F.2d 985, 1004-1005 (3d Cir.), cert. denied, 449 U.S. 899 (1980)). Although these cases have prevented a defendant from choosing a particular counsel, none has denied him the opportunity to choose any private counsel at all, which is the effect of the Fourth Circuit's ruling here. Compare, e.g., Matter of Klein, 776 F.2d 628, 633 (7th Cir. 1985)

right to choice of counsel is permissible has been resolved by the courts after weighing the particular interest in the administration of justice at issue against the extent of the interference with the defendant's opportunity to choose counsel. See, e.g., United States v. Wheat, 813 F.2d 1399 (9th Cir.), cert. granted, No. 87-4 (Oct. 5, 1987) (argued, Mar. 2, 1988); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); Linton v. Perini, 656 F.2d 207, 210 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); United States v. Leavitt, 608 F.2d 1290, 1293 (9th Cir. 1979).

The Fourth Circuit panel opinion properly balanced the competing interests and concluded that the CCE forfeiture provisions are unconstitutional to the extent they prevent the payment of legitimate attorneys fees (App., infra, 70a). The panel reasoned (id. at 60a-63a) that the right to counsel of choice, albeit qualified, is the core of the Sixth Amendment right to counsel, predating the more recently articulated right to appointed counsel (Gideon v. Wainwright, 372 U.S. 335 (1963)) and the right to effective assistance of counsel (McMann v. Richardson, 397 U.S. 759, 771 (1970)). Correctly distinguishing the cases permitting the

(state's rules "diminish somewhat" the available pool of attorneys); United States v. Burton, 584 F.2d 485, 492 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) (denial of continuance to obtain additional counsel may be permitted where defendant has already retained other attorneys); United States v. Garrett, 727 F.2d 1003, 1008 (11th Cir. 1984) (disqualification of counsel upheld where counsel's services "not irreplaceable"), aff'd on other grounds, 471 U.S. 773 (1985); Bedrosian v. Mintz, 518 F.2d 396, 401 (2d Cir. 1975) (refusal to appoint out-of-state counsel upheld where qualified in-state counsel available).

In United States v. Wheat, 813 F.2d 1399 (9th Cir.), cert. granted, No. 87-4 (Oct. 5, 1987) (argued, Mar. 2, 1988), the Solicitor General has argued that the qualified right to counsel of choice arises under the Fifth rather than under the Sixth Amendment (U.S. Br. 10-14). The Solicitor General nevertheless concedes that the right is of constitutional dimension and that it can be overcome only by the government's demonstration of a substantial countervailing interest.

denial of a defendant's request for a particular lawyer, the Fourth Circuit panel recognized that upholding the government's interpretation of the CCE forfeiture provision would deny a defendant the opportunity to hire any counsel at all. App., infra, 68a. Balancing the government's asserted interests in forfeiting fees against this total denial of a defendant's right to counsel of choice, the panel correctly concluded that the government's interests are paramount only to the extent they track the specific purpose of the "relation back" provision-to prevent sham transfers in the guise of attorneys fees (id. at 67a-69a). By permitting the payment of legitimate attorneys fees, the panel reasoned, the government's interest in depriving a criminal of the economic benefits of his crime upon conviction can be squared with the defendant's right to hire counsel of choice to defend him (id. at 67a).

In contrast, the en banc majority held that a defendant's Sixth Amendment right to counsel of choice "simply does not apply" to the pre-conviction impact of a government forfeiture claim on the ability to hire defense counsel (App., infra, 11a). The majority acknowledged (id. at 9a) that the statute "can render a defendant unable to secure private counsel through a restraining order or the threat of future forfeiture." But the majority nevertheless held the right to counsel of choice to be inapplicable, because it viewed the "relation back" provision of the forfeiture statute as involving a mere question of property law (id. at 11a-12a (emphasis in original)):

Each and every prior case applying the right to counsel of choice has assumed as its starting point that the defendant wished to hire defense counsel with his own assets. Here, this assumption is conspicuously absent. The very point of the inclusion of forfeiture in an indictment is the government's assertion that the assets possessed by a defendant are not legally his own, but the fruits of crime in which the law recognizes no ownership rights

of the defendant. Forfeiture is not an attempt to punish those with legal assets by denying them an attorney; it is an assertion that the defendant does not have the legal assets that entitle him to a right to counsel of choice in the first place.

The fact that the government contests the legal ownership of the assets is crucial.

By treating this case as involving only the practical qualification that a defendant's ability to exercise his right to choice of counsel is limited by his resources, the en banc majority ignored the government's role in rendering the defendant's assets unavailable to him. The unavailability of the defendant's assets comes about solely as a result of a prosecutor's allegation, under a federal penal statute, that a defendant has no assets that are not subject to forfeiture. Indeed, the majority's assertion that "the fact that the government contests the assets is crucial" (App., infra, 12a) concedes the government's responsibility for the defendant's impecuniousness. The Fourth Circuit justified its result by incorrectly stating that forfeiture is not a penalty (id. at 12a). The en banc majority's failure to weigh the competing interests of the government and the defendant under the customary Sixth Amendment balancing test is explicable only as the product of its mischaracterization of the case as involving simply a dispute over the ownership of assets in which the government's role is equivalent to that of a private civil litigant in a property contest.

Had the proper balancing test been applied, it would have been clear that the interference with retention of counsel created by the CCE forfeiture provisions does not pass muster under the Sixth Amendment. On one side of the balance, the interference with a defendant's ability to hire counsel is complete—no defendant subject to a forfeiture claim covering all his known assets, such as the claim in this case, will be able to pay or assure payment

of a lawyer and, consequently, he will be unable to retain any private counsel. This total denial of any opportunity to hire counsel has a direct impact on the reliability of the adversary process because it will frequently eliminate the lawyers who have represented the defendant prior to indictment and who are most familiar with the case.

Weighed against this broad deprivation of any opportunity to hire counsel with not-yet-forfeited assets are three governmental interests. The first is the general objective of the CCE and RICO statutes to remove the economic benefit of crime by imposing a criminal forfeiture penalty on convicted persons. The significance of this general objective, however, is severely constrained in the pre-conviction context by the due process prohibition on the imposition of punishment prior to conviction. See Bell v. Wolfish, 441 U.S. 520, 535-537 (1979); United States v. Salerno, 107 S. Ct. 2095, 2101 (1987). The significance of this general objective is even further diminished when the assets in question, if not forfeited to the government, would be paid to the defendant's lawyer as an arm's-length fee. The assets will then be removed in any event from the convicted person's "economic power base" (S. Rep. 98-225, supra, at 191), and the general penal goal of forfeiture will thus be achieved.9

<sup>\*</sup>As the panel recognized, the defendant in this case, Christopher Reckmeyer, would not have been represented by retained counsel if the law were not unsettled at the time of his indictment and Caplin & Drysdale had not agreed to contest the applicability of the CCE statute to attorneys fees (App., infra, 76a-77a n.11.)

The Fourth Circuit en banc suggested a much broader version of the governmental objective discussed in the text, reasoning that Congress intended to punish defendants prior to conviction by prohibiting them from hiring especially qualified lawyers. See App., infra, 21a. ("Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent."). Accord United States v. Nichols, Nos.

The second governmental interest is the one cited by Congress when enacting the relation-back provision—to "close a potential loophole" in earlier law whereby defendants sought to evade forfeiture by sham transactions and other "improper pre-conviction transfers" (S. Rep. 98-225, supra, at 196, 197, 200-201). This governmental interest, of course, would support the forfeiture of amounts paid to an attorney fraudulently or in excess of arm's-length norms. But this (concededly substantial) governmental interest does not support the forfeiture of legitimate attorneys fees, as the panel below correctly pointed out (see App., infra, 65a).

The third governmental interest advanced by the Fourth Circuit majority is that of preserving a defendant's assets for possible future forfeiture. See App., infra, 11a; S. Rep. 98-225, supra, at 195-196. The apparent premise of this argument is that the government is entitled to extract a fixed dollar value of assets from a defendant upon conviction, and that this sum will unavoidably be reduced by payments (however legitimate) to lawyers or other persons. But even if one assumes that this premise is correct, what it proves is that the only governmental interest served by forfeiture of attorneys fees is a financial interest, and a marginal one at that. Since the government must provide counsel to a defendant if he is unable to retain private

87-1459, 87-1743 (10th Cir. Mar. 10, 1988), (WESTLAW, CTA10 Database, at screen 47). But this Court has clearly held that substantive due process prohibits the imposition of punishment prior to conviction (see Bell v. Wolfish, 441 U.S. at 535-37; United States v. Salerno, 107 S. Ct. at 2101), which is precisely the result, as regards employment of retained defense counsel, that the Fourth Circuit seems to have approved here. Moreover, as the Fifth Circuit stated in Thier, "the notion that a defendant would commit criminal acts . . . in order to pay a reasonable fee to the attorney he chooses to assist in his defense is sophistry" (801 F.2d at 1475). As the dissent in Nichols put it somewhat more colorfully: "equating the ability to raise a defense to a 'benefit' of crime is like considering the right to a jury trial a benefit of being accused of murder" (WESTLAW at screen 64).

counsel, the essential governmental interest reduces to the difference between the amount of money it will cost the government to provide a lawyer (i.e., the cost of a public defender or appointed counsel), and the amount that the defendant's retained counsel would be paid.

The en banc majority of the Fourth Circuit, in effect, holds that this marginal increment in the amount of money the government may retain upon conviction is constitutionally superior to a defendant's Sixth Amendment right to counsel of choice. But this Court has never suggested that the government's interest in maximizing a monetary penalty has precedence over a defendant's constitutional rights. As the Fourth Circuit panel concluded, and as the four en banc dissenters found, the government's rather modest financial interest does not outweigh a defendant's right to retain some private counsel to defend him against the criminal charges.

It must be acknowledged that the en banc majority never expressly balanced the government's financial interest against the defendant's Sixth Amendment rights. Instead, the majority adopted the erroneous view that a defendant facing forfeiture charges has no assets to pay counsel, and hence that the right to counsel of choice "simply does not apply at all in the fee forfeiture context" (App., infra, 11a). By equating the fictive property law concept of the relation-back provision with such "[p]urely private predicaments" as creditors' liens or lack of wealth (id. at 13a), the en banc majority begged the constitutional question rather than answering it. Judge Phillips, speaking for the four dissenters, aptly put it as follows (id. at 27a):

[T]he ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. If the right [to counsel of choice] must yield here to countervailing governmental interests, the relation-back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them.

The majority's question-begging is the worse because it disregards the fact that here the legal fiction of the relation-back device is not merely a principle ordering competing property claims, but is a component part of a criminal penalty sought to be imposed on the defendant by the government.

3. Adverting to the constitutional difficulties that we have discussed, the Fifth Circuit in *Thier* and numerous district courts have held that the 1984 Act should be interpreted not to authorize the forfeiture of legitimate attorneys fees paid by a defendant to his counsel. That interpretation of the statute is faithful to its legislative history and conforms to well established rules of statutory construction.

In finding the 1984 Act "unambiguous" in extending to attorneys fees (App., infra, 6a), the Fourth Circuit relied on the absence of any express exemption for such fees and on its reading of the statute's "third-party transferee" provision, 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). That section states that a third-party transferee of a defendant's assets may defeat forfeiture only if he shows, not only that he was "a bona fide purchaser for value," but also that he was, at the time of the transfer, "reasonably without cause to believe that the property was subject to forfeiture." Since a lawyer representing an indicted defendant will be, of all possible third party transferees, the person least likely to be without such "reasonable cause," the Fourth Circuit concluded that no statutory exemption for attorneys fees exists.

Contrary to the Fourth Circuit's view, the language of the 1984 Act is not without ambiguities, ambiguities that have forced the courts to resort to the Act's legislative history to fill various statutory ellipses.10 This legislative history makes clear that Congress did not intend to authorize forfeiture of bona fide attorneys fees. Congress repeatedly stated that the 1984 amendments were aimed at "transfers that were not 'arm's-length' transactions" (S. Rep. 98-225, supra, at 200-201), at "improper preconviction transfers" (id. at 196, 197), at "improper disposition of forfeitable assets" (id. at 194), and at "sham or fraudulent transactions" (id. at 209 n.47). Congress emphasized that "nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt. 1, supra, at 19 n.1. Where, as here, Congress has indicated a limited scope for a statute, courts should not reach for the broadest possible construction, particularly when that broad construction gives rise to the very constitutional difficulties that Congress expressed its intent to avoid. The Fifth Circuit in Thier thus correctly concluded that the statute should be read to exclude legitimate attorneys fees from its scope, at least until Congress has more clearly indicated its intent to test the limits of what is constitutionally permissible. See, Boos v. Barry, 56 U.S.L.W. 4254, 4259 (U.S. Mar. 22, 1988) ("It is wellsettled that federal courts have the power to adopt narrowing constructions of federal legislation. . . . Indeed, the

For example, a lawyer, like many other purveyors of goods and services to a defendant, is a "seller" not a "purchaser" (21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B)), but the Fourth Circuit was able to rectify this apparent drafting oversight by relying on the statute's legislative history. See App., infra, 45a n.4. Similarly, persons who lend money to a defendant in exchange for a security interest in otherwise forfeitable assets are not literally "purchasers," but the government has conceded that such individuals are covered by section 853(n)(6)(B). See United States v. Reckmeyer, 628 F. Supp. 616, 619 (E.D. Va. 1986), aff d, 836 F.2d 200 (4th Cir. 1987). Indeed, some courts have held that unsecured trade creditors may make a claim against forfeited assets as bona fide purchasers under the forfeiture provisions. See United States v. Reckmeyer, 836 F.2d 200, 205-208 (4th Cir. 1987) (CCE); United States v. Mageean, 649 F. Supp. 820, 827-831 (D. Nev. 1986), aff d, 822 F.2d 62 (9th Cir. 1987) (RICO).

federal courts have a duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.") See also Gutknecht v. United States, 396 U.S. 295, 306-307 (1970); United States v. Rumely, 345 U.S. 41, 45 (1953); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 569 (1947); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis J., concurring); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892); United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-487 (1868).

4. In adopting the government's interpretation of the CCE forfeiture provisions, and by implication the virtually identical RICO forfeiture provisions, the decision below, unless reversed, will permit an unparalleled governmental intrusion into the traditional attorney-client relationship in criminal matters. The Fourth Circuit's decision will result in the elimination of private counsel from many complex criminal proceedings, based solely on the prosecutor's decision about what to charge in the indictment. Indeed, the Fourth Circuit's decision may prevent defendants from being represented by any counsel during grand jury investigations. Prospective counsel may be unwilling to take the risk that information he learns about his client's affairs during the investigation will result in his being unable to meet the statute's "reasonably without cause to believe" test with respect to fees paid prior to indictment if the government subsequently seeks forfeiture of those fees. See United States v. Badalamenti, 614 F. Supp. at 197.11

In those infrequent instances where a lawyer is willing to represent a defendant in the face of the government's forfeiture claims, the CCE statute as construed by the Fourth Circuit creates a direct personal conflict between the attorney's interest in his fee and his client's best defense. The lawyer in such circumstances will have a disincentive to learn facts about his client's conduct that might be relevant to the defense, but that might inhibit him from demonstrating in post-conviction proceedings that he was at the relevant time "reasonably without cause to believe" that the fee was subject to forfeiture. The conflict between a lawyer's desire to retain his fee and his obligation faithfully to represent his client could similarly result in a reluctance to pursue certain defense strategies, or in recommendations in the context of plea negotiations colored by counsel's judgment of which action is most likely to permit the payment of his fee.12

retaining legal counsel. But that is precisely the effect of the relation-back provision as construed by the court below.

12 The district court below aptly summarized these difficulties as follows (App., infra, 91a-92a):

The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. . . . Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity; the attorney's obligation to negotiate a guilty plea which is in his client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture; the attorney's desire to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture" would conflict with his obligation to maintain his client's confidences.

See also United States v. Badalamenti, 614 F. Supp. at 196-197; United States v. Rogers, 602 F. Supp. at 1349.

In Faced with inability to secure private counsel, a grand jury target will also be unable to qualify for appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, because he will not yet have been charged with an offense. Despite the fact that an individual is not constitutionally entitled to appointed counsel at the investigatory phase of a case (Massiah v. United States, 377 U.S. 201 (1964)), it would seem clear that either the Fifth or Sixth Amendment would bar Congress from prohibiting persons subject to grand jury investigation from

The significance of these conflicts of interest is not blunted by the Fourth Circuit's facile assurances that defense counsel will invariably rise above them. See App., infra, 18a-19a. A lawyer is ethically prohibited from entering into an attorney-client relationship, especially in a criminal case, where he has an actual personal conflict with his client; it is irrelevant whether he in fact abuses the conflict. See ABA Model Rules of Professional Conduct ("Model Rules"), Rules 1.7(b), 1.8(j); ABA Model Code of Professional Responsibility ("Model Code"), DR 5-103(A), 5-105(A). The conflicts created by forfeiture of attorneys fees closely resemble those created by contingent fees, which are ethically prohibited in criminal cases. Model Rules, Rule 1.5(d)(2); Model Code, DR 2-106(C). Such conflicts could easily rise to the constitutional level of ineffective assistance of counsel, spawning additional litigation affecting the validity of criminal convictions and pleas.13

The Fourth Circuit's decision would also work a fundamental change in the historic relationship between a defendant, his counsel, and the prosecutor. For almost 200 years prior to the 1984 forfeiture amendments, defense counsel could play his role in the adversary system without fear that he would himself be the target of government action except for conduct manifestly illegal, such as witness tampering, jury tampering, subornation of perjury, or the like. Now, the mere receipt of payment for services rendered in good faith may be prevented or attacked by the government. The prosecutor's considerable discretion in determining the scope of the indictment and the property subject to forfeiture in effect places defense counsel at the mercy of his adversary. One does not have to posit

malicious abuses of government power to recognize the significant shift in the balance of forces between prosecution and defense wrought by the Fourth Circuit's decision. The creation of such an imbalance of powers between prosecution and defense is in itself a violation of the Due Process Clause of the Fifth Amendment. See Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser").

Finally, the impact of a decision upholding the government's position in this case would be widespread and pervasive. Although most current litigation concerns defendants charged with drug-related crimes under the CCE statute, 15 the principle established in these cases will extend through the RICO statute to a variety of white collar criminal prosecutions. 16 The impact of the Fourth

<sup>&</sup>lt;sup>13</sup> This Court has held that actual conflicts of interest violate the Sixth Amendment guarantee of effective assistance of counsel, with no requirement that a defendant show prejudice from the conflict. Cuyler v. Sullivan, 446 U.S. 335, 349 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60, 76 (1942).

<sup>&</sup>lt;sup>14</sup> A ruling vindicating the government's position here would extend well beyond the fee forfeiture context. Under 18 U.S.C. (Supp. IV 1986) § 1957, enacted as part of the money-laundering statutes in 1986, an attorney could be prosecuted for receiving payment of a fee from what turns out to be a criminally derived source. The government may prosecute on a "willful blindness" theory to demonstrate an attorney's knowledge of the criminal derivation of his fee, thus placing him at risk, not only of losing his fee, but also of criminal prosecution for knowledge acquired in performing legal services for his client. If there is no constitutional protection for pre-conviction payment of legitimate attorneys fees, as the Fourth Circuit has concluded, there would be no limitation on the criminalization of usual and heretofore unobjectionable receipt of legitimate fees in the course of a criminal representation.

While disclaiming any reliance on the fact that the defendant in this case was charged with drug offenses (App., infra, 15a), the en banc majority opinion is replete with references to "drug merchants," the "illegal drug trade" and "drug kingpins." See id. at 16a, 19a, 21a.

<sup>&</sup>lt;sup>18</sup> The RICO forfeiture provision can produce draconian results, since it renders an entire enterprise subject to forfeiture if the government charges that it was used in a relatively isolated pattern of racketeering activity. For example, in a recent RICO prosecution in the Eastern District of Virginia, defendants convicted of selling \$105 worth of por-

Circuit's decision would expand even further as Congress adds to the list of forfeitable offenses: a bill now pending in Congress, for example, would make simple mail and wire fraud a forfeitable offense and other legislative initiatives under consideration would make the proceeds of tax crimes forfeitable under the money-laundering statutes.<sup>17</sup> The Fourth Circuit's decision, unless reversed, will thus cause many of the most complex white collar criminal prosecutions to devolve to court-appointed attorneys and to the public defender system, since private counsel will refuse to take the risk that their legitimately earned fees will subsequently be forfeited to the government.

The unprecedented alteration of the criminal justice system caused by the prospect of attorney fee forfeiture has created much controversy and confusion in the lower courts and in the legal profession. No appellate court has yet upheld the constitutionality and applicability of the statute to attorneys fees unanimously, and two appellate courts have taken the issue en banc. Numerous bar groups have expressed concern about the impact of fee forfeiture on the adversary system. Because of the conflicting decisions from the appellate and district courts, virtually all criminal defenses in forfeiture cases under CCE and RICO are now in a state of uncertainty, with the possibility of attendant injury to the rights of criminal defendants. These factors strongly counsel in favor of prompt review and resolution of the issues by this Court.

nographic material in violation of RICO forfeited their entire interest in their legitimate videocassette business valued at over \$1 million. United States v. Pryba, No. 87-00208-A (E.D. Va. 1988). A prospective defense counsel must be concerned, therefore, not only with whether assets used to pay his fees are criminally derived, but also with whether otherwise legitimate assets have become tainted by their connection, however remote, to criminal activity.

#### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

\*Peter Van N. Lockwood Graeme W. Bush

CAPLIN & DRYSDALE, CHARTERED One Thomas Circle, N.W. Washington, D.C. 20005 (202) 862-5000

\*Counsel of record.

April 11, 1988

<sup>&</sup>lt;sup>17</sup> See H.R. 2898, 100th Cong., 1st Sess. (1987); Draft Bill, Minor and Technical Criminal Law Amendments Act of 1988, § 149, Senate Committee on the Judiciary, 100th Cong., 2d Sess., (Jan. 7, 1988).

87-1729

No. 87-\_\_\_

FILED

APR 11 1988

JOSEPH F. SPANIOL JR.

IN THE

### Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,

Petitioner.

V.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

\*Peter Van N. Lockwood Graeme W. Bush Caplin & Drysdale, Chartered One Thomas Circle, N.W. Washington, D.C. 20005 (202) 862-5000

\*Counsel of Record

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### APPENDIX A

### UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-5050

# In re FORFEITURE HEARING AS TO CAPLIN & DRYSDALE, CHARTERED

Claimant,

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

Caplin & Drysdale, Chartered, Claimant-Appellee,

and

CHRISTOPHER F. RECKMEYER, II; ROBERT BRUCE RECKMEYER,

Defendants,

National Association of Criminal Defense Lawyers (NACDL); National Legal Aid and Defender Association (NLADA); and American Bar Association (ABA); Amici Curiae.

Argued Oct. 6, 1987. Decided Jan. 11, 1988. Before WINTER, Chief Judge, and RUSSELL, WI-DENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting in banc.

### WILKINSON, Circuit Judge:

This case presents a Sixth Amendment challenge to the application of the criminal forfeiture provisions of the Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. § 853, to defense attorneys' fees. Appellee Caplin & Drysdale contends that forfeiture of attorneys' fees violates the Sixth Amendment right to the assistance of counsel. We reject this challenge because there is no established Sixth Amendment right to pay an attorney with the illicit proceeds of drug transactions. The difficult policy choices posed by application of the forfeiture statutes to attorneys' fees provide no basis for the creation of such a right. Those choices are properly the concern of Congress, not the federal courts, and the plain language of the criminal forfeiture provisions indicates that Congress did not intend for attorneys' fees to be exempted.

I.

#### A.

The Comprehensive Forfeiture Act of 1984 (CFA), Pub. L. No. 98-473, 98 Stat. 2040 (1984), revised the forfeiture provisions of both the RICO and CCE statutes. This case concerns only a CCE prosecution, but the RICO provisions are basically identical. The CFA generally expanded the type of property that is subject to forfeiture, the crimes that can give rise to forfeiture, and prosecutors' ability to restrain property transfers by defendants both before and after indictment. Restraining orders under the CFA allow courts to enjoin defendants or their associates from moving

money out of the courts' reach prior to a conviction so as to escape forfeiture. See 21 U.S.C. § 853(e).

Critical to this case is the CFA's "relation back" provisions, under which forfeiture occurs at the time an offense is *committed*:

- (c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States . . .
- 21 U.S.C. § 853(c). The government thus takes the forfeited property that was in the hands of the defendant at the time of the offense, not at the time of conviction. Application of this provision to fees paid to an attorney prior to a conviction results in forfeiture of the fees, because the government's interest in the property predates the transfer to the lawyer.

The CFA allows a third party such as the attorney to assert an interest in the forfeited property in a post-for-feiture hearing. The third party can prevail only if:

- (B) The petitioner, is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section.
- 21 U.S.C. § 853(n). Thus, if attorneys or other third parties can meet the requirements of § 853(n), they may retain property that would otherwise belong to the government under § 853(c).

B.

This controversy over attorneys' fees arose during the tax and CCE prosecution of Christopher Reckmeyer. Reckmeyer controlled an illicit drug operation that employed over twenty people, distributed tons of marijuana and hashish, and created business entities that laundered drug profits through various types of transactions. Reckmeyer's plea agreement stated that his organization was responsible for the distribution of more than 169 tons of marijuana and ten tons of hashish over the course of fifty ventures. Reckmeyer realized millions of dollars from drug transactions, which were his only significant source of income. See United States v. Reckmeyer, 786 F.2d 1216, 1217, 1222 (4th Cir.1986).

During the summer of 1983, eighteen months prior to his indictment in the Eastern District of Virginia, Reckmeyer retained the law firm of Caplin & Drysdale. On January 14, 1985, the government obtained an ex parte restraining order under the CCE statute preventing any transfer of Reckmeyer's assets. One day later the government filed an indictment that sought forfeiture of virtually all of Reckmeyer's assets. Reckmeyer made regular fee payments to Caplin & Drysdale. One of these payments consisted of approximately \$25,000 in cash, delivered to the firm on January 25, 1985, the day Reckmeyer surrendered to authorities. The firm notified the court of the receipt of the funds, which were then deposited in an escrow account. After the indictment, Caplin & Drysdale continued to represent Reckmeyer at his request.

Reckmeyer pled guilty to three counts of the indictment on March 14, 1985. On the following day, the district court denied Caplin & Drysdale's motion to exempt its fees from a post-indictment restraining order that had been issued in January. The court ruled that because Reckmeyer had pled guilty, Caplin & Drysdale could claim its fees only through the post-forfeiture hearing provided to third par-

ties by § 853(n). Upon Reckmeyer's conviction on May 17, 1985, the court entered a forfeiture order encompassing virtually all of Reckmeyer's assets, including the \$25,000 held in escrow. One month later, Caplin & Drysdale filed a third-party claim for \$170,000 in unpaid legal fees. Caplin & Drysdale asserted that CCE forfeiture does not encompass fees paid for legal defense services actually rendered, and that if the statute does encompass fees, it violates the Fifth and Sixth Amendments.

The court granted Caplin & Drysdale's third-party claim, holding that Congress did not intend for the forfeiture provisions to reach fees paid for actual services. United States v. Reckmeyer, 631 F.Supp. 1191 (E.D.Va.1986). The court further stated that an interpretation of the statute that allowed fee forfeiture would violate the defendant's right to counsel of choice and to effective assistance of counsel. Id. at 1196. The government appealed, and the case was consolidated for argument with two others. A panel of this court affirmed the district court, holding that the CFA does apply to attorneys' fees, but that the statute is to that extent unconstitutional because it violates the Sixth Amendment right to counsel of choice. United States v. Harvey, 814 F.2d 905 (4th Cir.1987). This court granted rehearing en banc in the Caplin & Drysdale case alone.

II.

The threshold question in this case is whether the CFA permits the forfeiture of attorneys' fees. As to that issue, we endorse the panel opinion in *Harvey* and briefly summarize its conclusions. The panel opinion noted that the CFA's language is unmistakably clear, and so plainly reaches property used or intended to be used for attorneys' fees that the inquiry should end without resort to legislative history. In any event, the legislative history provides no basis for concluding that attorneys' fees are not subject to forfeiture under the terms of the CFA. *Harvey*, 814 F.2d at 913-18.

The language of the forfeiture statute makes no mention of attorneys' fees, either in its definition of property that is subject to forfeiture in sections 853(a) and (b), or in its provision for third-party claims of exemption in § 853(n). The clear terms of the statute subject a defendant's assets to forfeiture without regard to whether he intends to use them to pay an attorney. Similarly, the statute exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys. Where, as here, a statute's language is unambiguous, the court's task of statutory construction is at an end unless enforcement of the literal language would contravene a clearly expressed legislative intention. Russello v. United States, 464 U.S. 16, 20, 104 S.Ct. 296, 298, 78 L.Ed.2d 17 (1983).

The legislative history of the CFA reveals no congressional intent that would require exemption of attorneys' fees from the reach of the statute. Some courts have seized upon passages in the legislative history expressing the need to prevent defendants from avoiding forfeiture through sham transactions. From these passages, the courts have concluded that forfeiture is to apply to attorneys' fees only if the funds were given to the attorney not in return for services, but in order to fraudulently harbor them from forfeiture. See United States v. Estevez, 645 F.Supp. 869 (E.D.Wis.1986); United States v. Ianniello, 644 F.Supp. 452 (S.D.N.Y.1985); United States v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y.1985); United States v. Rogers, 602 F.Supp. 1332 (D.Colo.1985). Congressional disapproval of a specific type of conduct cannot, however, legitimately be used to restrict statutory language that is unambiguously more broad. See Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 110-11, 100 S.Ct. 2051, 2057-58, 64 L.Ed.2d 766 (1980); Harvey, 814 F.2d at 916.

Further, limiting forfeiture to assets transferred in sham transactions would read the bona fide purchaser requirement right out of the statute. Section 853(n) plainly says that only those who purchase property for value and without cause to believe that it was subject to forfeiture shall be exempt from an order of forfeiture. The specific listing of the assets in the indictment and the payment of their fee in cash gave the attorneys representing Reckmeyer ample cause to know that the funds were forfeitable under 21 U.S.C. § 853. They have acknowledged that they have no claim to make under the clear terms of § 853(n).

### III.

We next turn to Caplin & Drysdale's constitutional claims. Although no problems of standing attend Caplin & Drysdale's claim of a statutory exemption for their fees, we recognize as an initial matter that the firm's constitutional claims are in one sense raised in the abstract. Caplin & Drysdale's assertion of Sixth Amendment rights arises out of a prosecution in which the defendant has undeniably received every benefit conveyed by the Amendment. Reckmeyer was not only represented by counsel, but the counsel of his choice. So far as the record indicates, that representation was effective.

Nonetheless, we believe this case presents a justiciable controversy. Caplin & Drysdale has approximately \$170,000 at stake here. It faces the "concrete injury" of the loss of that sum, a loss that is clearly occasioned by the government's application of the forfeiture statute and would just as clearly be redressed by the finding of unconstitutionality that the law firm urges. The elements of injury, causation, and redressability are all present, and the constitutional requirements for standing under Article III are thus satisfied. Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976).

Caplin & Drysdale is therefore a proper party to assert Sixth Amendment objections to fee forfeiture, subject only to the prudential concerns raised by third party assertions of constitutional rights. The Supreme Court has emphasized two prudential concerns with third party standing: the concern that constitutional rights not be litigated unnecessarily, and the concern that a third party may not advocate the right as effectively as its actual holder. See Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 2873-74, 49 L.Ed.2d 826 (1976).

In this case, each of the factors developed by the Court to address these prudential concerns plainly points to a decision on the merits. The interests of the defendant in hiring a lawyer and the interest of the lawyer in receiving a fee are "inextricably bound" together. Id. at 114, 96 S.Ct. at 2874. The assertion of this constitutional claim is extremely important to Caplin & Drysdale, criminal defendants, and the bar, and its resolution is in no way "unnecessary." Caplin & Drysdale is fully "as effective a proponent" of the right asserted as the defendant. Id. at 115, 96 S.Ct. at 2874. The firm's interest in its fee and in the future effects of fee forfeitability ensure ample incentives for proper adversarial presentation of the issues. Further, these issues have already been forcefully argued by the parties, decided by a district court, and reviewed by a panel of this court. The prudential concerns strongly favor the resolution of this issue by the en banc court, and we therefore turn to the merits of Caplin & Drysdale's claim.

#### IV.

In addressing Caplin & Drysdale's constitutional challenge, we emphasize at the outset that forfeiture of attorneys' fees poses no threat whatsoever to the absolute right to be represented by counsel. This right to representation is fundamental to our system, and universally recognized as an "immutable principle of justice" implicit in due process. *Powell v. Alabama*, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). From its Fourteenth

Amendment origins in *Powell*, this principle has been refined, and its application broadened, in a series of cases construing the specific guarantee of counsel in the Sixth Amendment. It has come to mean that a criminal defendant has the absolute right to representation either by retained counsel or by appointed counsel in a proceeding that threatens imprisonment. See, e.g., Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

There is no argument here over whether forfeiture can operate to deny a defendant this absolute right to representation—it cannot. At most, the Comprehensive Forfeiture Act can render a defendant unable to secure private counsel through a restraining order or the threat of future forfeiture of illicit funds. Should this occur, the defendant's right to representation will be protected by the appointment of counsel. The result here will have no effect on the basic and absolute Sixth Amendment right of CCE defendants to representation.

Some courts have suggested that forfeiture could violate this absolute right to representation where a defendant is unable to hire an attorney with assets in his possession due to potential forfeiture, but is unable to secure appointed counsel because he is not technically indigent. See, e.g., United States v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y.1985). While it is true that Criminal Justice Act appointments are based on financial inability, see 18 U.S.C. § 3006A(a), the spectre of drug defendants being tried and convicted pro se is hardly realistic. No criminal defendant can be made to stand trial without counsel for any reason. E.g., Powell, supra. Which form that representation may take is debatable, but the absolute right to representation is not.

We cannot accept, however, the suggestion appearing throughout Caplin & Drysdale's argument that the presumption of innocence forbids any interference with a defendant's property prior to a verdict of guilty beyond a reasonable doubt. Forfeiture, like other pretrial deprivations, is problematic in that it can interfere with the use of property that is merely alleged to be illicit, and thus owned by the government. The fact that no trial has yet been held does not mean, however, that the government is powerless to protect the public interest in any way that interferes with liberty or property. To assign such a value to the presumption of innocence would mean, for example, that there could be no arrests, and certainly no pretrial detention of defendants. Just as the government may restrain liberty to prevent the flight of a suspect, Bell v. Wolfish, 441 U.S. 520, 534, 99 S.Ct. 1861, 1871, 60 L.Ed.2d 447 (1979), it may restrain property to prevent the flight of forfeitable assets. The presumption of innocence is of undoubted importance in assigning the burden of proof at trial, but it is not a grant of immunity from pretrial inconvenience. Id. at 533, 99 S.Ct. at 1870.

Pretrial deprivations of liberty or property must, of course, be imposed in accordance with the requirements of due process. The strictures of due process do not, however, convey an absolute right to be free of pretrial deprivations, just as the procedural protections of the Fourth Amendment do not convey an absolute right to hold one's property free of lawful searches and seizures. Cf. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (allowing seizure not only of fruits and instrumentalities of crime, but also of "mere evidence"). If there is any general objection to be made to forfeiture as a pretrial deprivation, it must be based on the procedures involved, not on a general right to be free from all restraint on liberty and property. No such procedural due process challenge is before us today.

The government has a strong interest in seeing that criminal assets are not dissipated prior to trial. Thus, no one would argue that the government must allow a defendant to use contested assets to purchase most categories of consumable services or goods. Neither restraining orders nor a merchant's refusal to sell to the defendant for fear of future forfeiture violates that defendant's rights. Given that the government may take steps to prevent these types of expenditures prior to a verdict, we are left with the question whether the Sixth Amendment forbids interference with an expenditure for the specific purpose of hiring a lawyer. For the reasons that follow, we hold that it does not.

V.

Both parties and courts have focused on the qualified right to counsel of choice as the basis for the proposed requirement that attorneys' fees be constitutionally exempt from forfeiture. Courts have recognized this right to counsel of choice as an independent right, expressed as the "right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by the attorney of his choosing." United States v. Inman, 483 F.2d 738 (4th Cir. 1973) (emphasis added). As stated by the Harvey panel opinion, this "means, in general, a right to retain private counsel of choice out of one's private resources, free of government interference." Harvey, 814 F.2d at 905-923 (emphasis added). This right is a "qualified" right, defined primarily in cases where a defendant has sought a continuance in order to hire new counsel, and it is limited by the government's interest in the orderly administration of justice. See, e.g., Sampley v. Attorney General of North Carolina, 786 F.2d 610 (4th Cir.1986); Inman, supra.

We need not reach the question of how this right is qualified, however, for it simply does not apply at all in the fee forfeiture context. Each and every prior case applying the right to counsel of choice has assumed as its starting point that the defendant wished to hire counsel with his own assets. Here, this assumption is conspicuously absent. The very point of the inclusion of forfeiture in an indictment is the government's assertion that the assets possessed by a defendant are not legally his own, but the fruits of crime in which the law recognizes no ownership rights of the defendant. Forfeiture is not an attempt to punish those with legal assets by denying them an attorney; it is an assertion that the defendant does not have the legal assets that entitle him to a right to counsel of choice in the first place.

The fact that the government contests the legal ownership of the assets is crucial. The government could not, for example, simply restrain funds to which it claims no legal entitlement so as to force a defendant to accept appointed counsel. See United States ex rel. Ferenc v. Brierley, 320 F.Supp. 406 (E.D.Pa.1970). For this reason, fee forfeiture is not, as the Harvey panel has suggested, the constitutional equivalent of a government-imposed cap on spending for defense counsel or a law requiring those charged with certain crimes to rely on appointed counsel. In these situations, the government attempts to restrict the defendant's use of his own undisputed assets. In the fee forfeiture context, the assets sought by the government are alleged to be an integral part of the very crime with which the defendant is charged. See 21 U.S.C. § 853(a) (providing for forfeiture of property "constituting. or derived from" proceeds of drug transactions, property "used or intended to be used" to commit drug violations, and property "affording a source of control over" a drug enterprise). The government seeks to deny use of the property not as a mere penalty, but because the assets are themselves illicit.

The right to counsel of choice belongs only to those with legitimate assets. The right to counsel does not guarantee that every defendant will have the lawyer he desires. Rather, the Constitution reflects the "harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy." Morris v. Slappy, 461 U.S. 1, 23, 103 S.Ct. 1610, 1622, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring). The Sixth Amendment assures the fact of representation. Equality of representation has been thought a goal beyond constitutional attainment. Those with their own funds must be given the fair opportunity to secure counsel up to the limit of their funds; those without assets of their own must be satisfied with appointed counsel, over whose selection they may have little influence. See generally, Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan.L.Rev. 73 (1974). Inevitably, there are multitudinous circumstances and conditions that may remove a defendant from the class of persons who have a right to choose their lawyers, but that will not thereby infringe his Sixth Amendment rights.

Purely private predicaments may leave a defendant without the counsel of his choice. Any attorney may decline to accept a case despite the fact that he was chosen by a defendant. This decision may be made for the simple financial reason that the attorney does not expect the defendant to be able to pay. The possibility also exists that a creditor might obtain liens against a criminal defendant's property, preventing the defendant from hiring a lawyer. Rules imposed by the government may likewise prevent the hiring of chosen counsel. Rules requiring appointment of local counsel may have this effect. See Ford v. Israel, 701 F.2d 689, 692-93 (7th Cir.1983). Court-imposed scheduling may also prevent participation by chosen counsel. See Inman, 483 F.2d at 740. No Sixth Amendment violation exists in any of these situations, yet one is claimed where forfeiture produces the same result.

Forfeiture, in our view, is another of those events that may prevent a defendant from choosing his counsel but does not involve any denial of the qualified Sixth Amend-

ment right to counsel of choice. The most relevant analogy, though rejected by the panel in Harvey, is to the example of bank robbers' loot. Suppose a bank is robbed and \$100,000 taken. A defendant is arrested in possession of \$100,000 and nothing more. The defendant protests his innocence and claims, without the slightest proof, that the \$100,000 was in fact a gift from a friend. Surely no one will contend that the \$100,000 must be made available to pay the defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty. Yet this is exactly the result that Caplin & Drysdale asserts must be guaranteed to the drug defendant. We reject this claim, for the situations are equivalent, and in each the government may legitimately take steps to preserve the contested assets. In each the defendant is entitled to representation by an appointed attorney if he has no uncontested assets available for securing private counsel.

The panel opinion attempted to dismiss the parallel between illicit drug proceeds and robbers' loot, but in our view it did not, and could not, succeed. The opinion states that the situations are different because the property seized from the bank robbery defendant is "manifestly that of someone other than the accused." Harvey, 814 F.2d at 926. But this will not always be the case: the robber may have deposited the proceeds in his own account or otherwise disguised them. Similarly, the assets sought to be forfeited from a CCE defendant may well be "manifestly" illicit, as is the case where the defendant has piles of cash and no records of any legitimate income whatsoever. Yet the broad constitutional rule that we are invited to createoutright exemption from forfeiture for all fees that are for services rendered, see Harvey, 814 F.2d at 927-would require release of the illicit assets to the defendant's chosen lawyer.

The Harvey panel also emphasized that CCE assets are not asserted to be those of a third party such as a bank,

but merely those of the United States. The government, like other litigants, however, may assert an interest in property to which it claims a legal entitlement. This is certainly true where that entitlement is specifically conveved to further the imperative task of fighting organized drug enterprises. Civil forfeiture and jeopardy tax assessments are relevant analogies here. Several cases have persuasively rejected claims that jeopardy assessments causing inability to hire counsel violate the Sixth Amendment. See United States v. Brodson, 241 F.2d 107 (7th Cir.1957) (rejecting claim that jeopardy assessment preventing retention of counsel necessarily violates Sixth Amendment and rejecting as "immaterial" for purposes of a due process claim any distinction between indigency and "governmentimposed" indigency); see also United States v. Marshall, 526 F.2d 1349 (9th Cir.1976) (rejecting any requirement that alternative funds for counsel be made available to a defendant whose assets were under a tax levy absent a showing of prosecutorial misconduct); United States v. Allied Stevedoring Corp., 138 F.Supp. 555 (S.D.N.Y.1956) (rejecting corporation's claim that funds must be released from tax levy so that it could pay for chosen counsel, stating that counsel could be appointed if necessary). We similarly reject Caplin & Drysdale's claim that the Sixth Amendment forbids forfeiture proceedings that render a defendant indigent. In such a situation, Sixth Amendment requirements are satisfied by the availability of appointed counsel.

We thus decline to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets. The dissent suggests that it is the enormity of the class of crimes at issue that forms "the lynchpin of the majority's constitutional analysis." To the contrary, we do not single out any class of defendants for disfavored treatment. We simply decline the invitation of the dissent to accord this class of criminal defendants a unique and favored constitutional status. Such a rule would

constitutionally prefer the drug merchant with none but illicit assets not only to indigent defendants but to defendants with untainted assets, who must sacrifice them to secure the counsel of their choice. An outright exemption of attorneys' fees from forfeiture would impose a regime of stark inequality whereby those most successful in harvesting the fruits of criminal activity would be those most able to secure representation others are not constitutionally guaranteed and cannot personally afford.

Our conclusions have been well stated by a leading commentator on fee forfeiture:

Criminal defendants have no sixth amendment right to demand that crime-related assets be kept available to pay for privately retained counsel. The sixth amendment guarantees only the right to use *legitimate* assets to obtain the assistance of counsel. If the defendant has no assets, the sixth amendment requires the appointment of counsel. It does not prevent prosecution of the indigent or require the government to provide the wherewithal to retain private counsel of choice.

Brickey, Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 Va.L.Rev. 493, 533 (1986). Nothing in the Sixth Amendment requires what Caplin & Drysdale requests—a constitutional right to use criminal assets to hire counsel.

### VI.

We hold, therefore, that forfeiture defendants may be required to rely on appointed counsel if they do not have sufficient uncontested assets to hire a private attorney. We likewise reject the contention that appointed counsel are presumptively unqualified to handle Continuing Criminal Enterprise cases.

To accept the argument that appointed counsel cannot provide a constitutionally adequate defense in CCE cases

would lead to the absurd result that the government could not prosecute drug defendants apprehended with no funds in their possession, for prosecution would be unconstitutional if the defendants could not afford firms specializing in the defense of drug offenders. See Brickey, supra, at 521. That forfeiture may place strains on public defenders' offices and Criminal Justice Act resources may be problems of policy, but they give this court no warrant to create new constitutional rules. There exist no grounds for a constitutional presumption of incompetence on the part of appointed counsel. See United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In a specific case in which a defendant receives ineffective assistance at trial, he can challenge his conviction on that well-established basis. See Cronic, supra; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We similarly cannot accept the assertion that fee forfeiture is unconstitutional per se because where a defendant is able to hire counsel it will create impediments to attorney-client communication and conflicts of interest. Where a defendant has been able to hire a lawyer of his choice, claims of interference in his relationship with that lawyer must at most be claims of government-caused ineffective assistance. Such claims may be properly reviewed only on the individual facts of a particular case. Cf. United States v. Morrison, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981); Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (both rejecting claims of a per se Sixth Amendment rule against interference in attorneyclient relationship). Claims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemaking. See United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We will not declare fee forfeiture per se unconstitutional on the basis of such speculative dangers to attorney-client cooperation.

Our decision not to declare fee forfeiture per se unconstitutional is bolstered by the fact that the impediments to communication and the potential for conflicts of interest are more theoretical than real. It is difficult to believe that, despite their professional obligations as defense lawyers, retained counsel will somehow attempt to go to trial with incomplete knowledge of a case so as to preserve "bona fide purchaser" status in the event of a forfeiture. Further, the Justice Department Guidelines for use of the forfeiture statutes minimize the possibility of this unlikely occurrence. Under the Guidelines, a prosecutor cannot pursue forfeiture of actual fees without reasonable grounds to believe that the attorney had actual knowledge that the particular asset with which he was paid was subject to forfeiture. See Justice Department Guidelines on Forfeiture of Attorney's Fees, 38 Crim.L.Rep. (BNA) 3001, 3004 (1985). Under this standard, if a defendant has any uncontested assets, the attorney should be able to satisfy himself that he is paid out of these assets with little difficulty, and thus have no fear of fee forfeiture. On the other hand, where an attorney chooses to accept payment in assets named in a forfeiture indictment or a huge cash sum, any later attempts to avoid knowledge would be insufficient to qualify the attorney as a bona fide purchaser.

The notion that defense attorneys will behave unethically as a result of potential forfeiture is also highly speculative. Caplin & Drysdale argues that defense counsel will enter into plea agreements carrying long prison terms for the client in return for a lessened forfeiture verdict that preserves their fee. We refuse to presume that members of the bar will act in such an unethical fashion, even assuming that they could convince their client and the court to approve. Cf. Evans v. Jeff D., 475 U.S. 717, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986) (rejecting argument that allowing waiver of attorneys' fees in § 1983 cases would

lead attorneys to violate ethical obligations to their clients in order to protect their fees). We do not doubt that fee forfeiture will have important implications for defendants and lawyers alike, but these implications cannot justify declaring fee forfeiture per se unconstitutional.

Finally, the possibility that a prosecutor might abuse the forfeiture statutes in a particular case does not justify holding all fee forfeiture unconstitutional. Courts have ample tools for dealing with situations where prosecutorial misconduct threatens the fairness of a trial. Due process claims of this type must, however, be dealt with on specific facts. Every criminal law carries with it the potential for abuse, but a potential for abuse does not require a finding of facial invalidity.

#### VII.

The arguments advanced against fee forfeiture are in truth nothing more than an invitation for this court to make its own policy under the guise of creating a new constitutional right. Fee forfeiture does indeed raise many complex problems concerning access to defense counsel, the attorney-client privilege, and the resource needs of public defenders. All of these are weighty matters, yet none are violations of established Sixth Amendment rights. Congress in the first instance is the proper body to deal with these issues, and courts in specific cases are always present to prevent or to punish abuses.

In the Comprehensive Forfeiture Act of 1984, Congress recognized that the illegal drug trade poses a grave threat to every part of our society. The trade has spawned violent crime, threatened the integrity of local law enforcement, and condemned countless thousands of young lives to the service of a chemical compulsion. "Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." S.Rep. No. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. Code Cong.

& Ad. News 3182, 3374. The Comprehensive Forfeiture Act represents, above all, Congress' attempt to "strip these offenders and organizations of their economic power," and the recognition that "forfeiture is the mechanism through which such an attack can be made." Id.

The unwarranted creation of an outright constitutional ban on fee forfeiture will not only restrict the scope of Congress' past efforts to address this problem; it will eliminate future legislative flexibility to deal with fee forfeiture in different ways. This would be an unwarranted judicial intervention into the legislative arena. The fact that judicial balancing of societal and individual interests is regularly and properly employed in areas of constitutional rights and liberties does not lessen the fact that balancing of personal and public interests is presumptively a matter of legislative prerogative. Absent a constitutional right, which we have not found to be present here, the balancing of public and private interests is for Congress under its enumerated powers and for state legislatures under their residual police powers.

Indeed, we recognize that upon weighing the interests involved here, Congress could well decide that exemption of attorneys' fees from forfeiture is the wisest course. Many substantial arguments can be made for such a result. Congress may decide that public defenders would be overburdened by additions to their caseloads that fee forfeiture may cause, or that the present public compensation scheme for appointed attorneys under the Criminal Justice Act, 18 U.S.C. § 3006A, is inadequate to finance CCE defenses. It may be too that Congress will perceive specialized private law firms as uniquely capable of undertaking lengthy and complex CCE defenses. Investigation may show that the threat of fee forfeiture has caused withdrawal of counsel and disruption of trials. Congress might find that the potential for conflicts of interest and chilling of attorney-client communications are entitled to substantial weight. Each of these concerns, however, requires exactly the type of inquiry that Congress through empirical investigation and public hearings is empowered to conduct. Choices concerning the relative roles of public defenders, appointed counsel, and the private bar in CCE defenses are classic legislative matters. Every policy debate is not a constitutional debate, and the fact that lawyers are involved does not definitively mark a controversy as one of exclusive judicial competence.

Congress may also conclude that important public interests support fee forfeiture. First, the government claims a strong interest in deterrence that is served by fee forfeiture. It is true that no one engages in crime solely to make money to hire attorneys. Yet the drug kingpin's certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars may make him less apprehensive about continuing in his business. Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent.

Also at stake in the forfeiture debate are the effects on the bar and on the public's perception of the administration of justice. Of course, we are not concerned here with sham transfers to attorneys—these are obviously forfeitable. Even with regard to actual fees, however, there may be problems with a rule that allows attorneys to knowingly profit from money made in the drug trade. See Merkle, Are Prosecutors Invading the Attorney-Client Relationship?, 71 A.B.A.J. 38, 19 (1985). Insulation of legal fees from forfeiture could also make it far easier for attorneys to become involved in organized crime as ongoing legal advisers, rendering legal advice to help drug violators thwart investigations and avoid indictments.

The effect of such a trend on the legal profession may be anything but salutary. Public confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture. Public cynicism and distrust of the legal system might grow as citizens watched huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege. We cannot foresee what different approaches Congress may take toward the problem of fee forfeiture. The interests on each side of this controversy are weighty and profound. We believe, however, that this is not a debate that should be silenced by judicial fiat.

### VIII.

The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money, which there is probable cause to believe is illicit, entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense.

The order of forfeiture in this case is subject only to the rights of third parties as they are specifically defined by Congress in 21 U.S.C. § 853(n). The judgment of the district court, exempting appellee's fees from the order of forfeiture, is hereby

### REVERSED.

WIDENER, Circuit Judge, concurring:

I concur in Judge Wilkinson's majority opinion without reservation.

I would add, however, that I think we lend too much dignity to this claim.

Reckmeyer admittedly was represented by capable, paid attorneys throughout all stages of his criminal prosecution.

Whatever he has suffered has not been for lack of counsel of his choice. Reckmeyer, therefore, has not suffered any loss of any Sixth Amendment right to counsel.

Any substantive rights Caplin & Drysdale may have to the money which was seized by the government prior to Reckmeyer's unlawful payment to Caplin & Drysdale, in violation of the attachment order, can rise no higher than Reckmeyer's right. Since Reckmeyer had no Sixth Amendment right at the time of the payment to Caplin & Drysdale, then Caplin & Drysdale should have no Sixth Amendment right to assert in this proceeding.

Left to my own devices, I would not reach any constitutional question which may be involved and would simply reverse.

I am outvoted, however, by my colleagues on my theory of the case, and therefore I join Judge Wilkinson's opinion.

MURNAGHAN, Circuit Judge, concurring:

Judge Wilkinson has said nearly all there is to be said and, in concurring, I do not wish to be viewed as departing from him in any substantial way. On the contrary, I merely wish to add one or two thoughts which may have a bearing on the subject which is one of wide interest and considerable importance.

The first is not a problem directly involved in the current case. However, it is a matter of continuing importance which, should it arise, would considerably limit or alter the opinion expressed in Judge Wilkinson's effort. The opinion assumes that Criminal Justice Act appointments of counsel for indigent defendants sufficiently satisfy the constitutional guarantee of adequate representation of counsel. However, there has always been a tension to this assumption because the rate scale for appointees under the Criminal Justice Act tends to linger, sometimes substantially, behind the "going rate". If the gap between what the government will provide to an indigent defendant

so that he or she can make a respectable defense and the market rate for a respectable defense reaches a significant point, much of the rationale of Judge Wilkinson's opinion will have been undercut. Research of the question of adequacy of compensation to court appointed counsel involves many diverse and complicated questions. On the one hand, it will be distasteful for the government to set a fee scale interfering with the private right of defense lawyers to set their fees at whatever level they deem appropriate. Normally in a free market participants are free, even encouraged, unilaterally to set prices. Also, lawyers may be expected to resist to the end any approach which involves assignment to represent a defendant when the lawyer would prefer not to assume the defense. On the other hand, letting anyone, lawyer or other person, unilaterally to fix the price in an area infused with a great public interest has obvious disadvantages. These multi-fold questions are manifestly ones for the legislature initially. However, paying lawyers inadequately has drawbacks, especially when other contractors, say for the construction of government buildings, would be astonished and indignant if asked to perform the work on a non-compensatory basis. Should the adequacy of counsel's compensation reach a level of constitutional inquiry, the underpinnings support for Judge Wilkinson's opinion, excellent as it is as things now stand, may require reexamination.

On a second subject, there is the consideration implicitly present in all situations such as the one faced by Caplin and Drysdale Chartered here, that the defendant may be innocent or at least has not been proven guilty at the time the lawyer is approached with a view to retaining him or her (or them) to undertake a defense. The lawyer's creed, formerly common, that the practice of the law is not, or at least not primarily, merely a money grubbing business tends to suffer somewhat when counsel, faced with the necessity of appearing on a contingency basis, screams "constitutional" violation. After all, if the case develops

in a way favorable to the defendant, the forfeiture or the attempt at forfeiture may be voided, and the funds that had been noticed for forfeiture would, therefore, be available to meet legal fees.<sup>1</sup>

The fact that perhaps the contingency is too risky financially to be attractive should not alert constitutional considerations. Indeed, when the shoe is on the other foot, some lawyers engaged in personal injury practice will not willingly represent a potential client even though he or she is quite sufficiently endowed with adequate funds to meet the lawyer's charges on an hourly fee basis and would prefer to do so. Instead, some such lawyers have been known to insist only on doing such work on a contingent fee basis, presumably because, overall, the likelihood of success is great and, when all the cases are jumbled together, the contingency fee at perhaps 30% or more of recovery is more attractive to the lawyers than a fixed hourly fee from a fully solvent plaintiff. Indeed, the American Bar Association's Standing Committee on Ethics and Professional Responsibility in its informal opinion 1521 (1986) went so far as to state that it was unethical for a lawyer not to offer prospective clients alternative fee arrangements before accepting a case on a contingent-fee basis. One rationale was that the fiduciary nature of the relationship requires the lawyer to discuss with the prospective client who can pay a fixed fee the alternative of doing so before accepting a contingent-fee arrangement. See Model Code of Professional Responsibility DR 2-106

It should be emphasized that in alluding to the contingent fee I am in no way attempting to diverge from the Model Code of Professional Responsibility or the Model Rules of Professional Conduct. I am aware that both the Model Code and Model Rules prohibit a contingent fee in a criminal case. Model Code of Professional Responsibility DR 2-106(C) (1980); Model Rules of Professional Conduct Rule 1.5(d)(2) (1983). I write at the constitutional level; I did not feel a contingent fee would be unconstitutional. I in no way mean to imply that on another level ethical principles might not evolve which would outlaw contingency in fees.

(1980); Model Rules of Professional Conduct Rule 1.5 (1983).

In short, lawyers hardly had a constitutional basis for saying they were entitled to insist on contingent fee bases before undertaking representation in accident cases. By a similar token, protection against a requirement, in effect, that they take representation on a contingency fee basis alone does not seem to rise to the constitutional level.

JAMES DICKSON PHILLIPS, Circuit Judge, dissenting:

I agree with the court's holding that the appellee-lawyers have standing in this case to challenge the statutory forfeiture provisions, and that, as written, those provisions reach property contracted for or paid as attorney fees just as any other property made subject to forfeiture by the provisions.

For reasons expressed in the superseded panel opinion, 814 F.2d 905, 918-27, however, I dissent from the court's further holding that the forfeiture provisions, as applied to such property, violate no constitutional right of the defendant. I would hold instead that to the extent those provisions permit the government to deprive the defendant in a criminal case of the ability to pay legitimate and reasonable attorney fees for his defense against the underlying criminal charges, they violate this specific sixth amendment right. On that basis, I dissent from the court's judgment.

Having already expressed my views on the constitutional issue, there is no need to repeat them here in detail and

I adopt the relevant portions of the vacated panel opinion as the basis of my dissent here. I have only a few additional thoughts prompted by the en banc court's constitutional analysis.

That analysis rightly focuses on the qualified right to counsel of choice as the particular aspect of the multifaceted sixth amendment right ultimately implicated by these forfeiture provisions. As I read the court's opinion, it holds that Congress does not violate this right by allowing government prosecutors to prevent RICO and CCE defendants (or imminent defendants) from using allegedly tainted financial resources with which, barring governmental action, they would be able to hire and retain private counsel to defend them against those charges. This is said to be so for several reasons which simply bespeak the severely qualified nature of this particular right.

First, there is the fact that by its very nature this constitutional right of an accused person—uniquely among those protected in the bill of rights—is dependent upon the possession of financial resources with which to exercise it. Seizing on this undoubted irony, the majority points out that a defendant does not have the resources to exercise the right, hence has no right, when the government has already, by the relation-back feature of these forfeiture provisions, asserted a paramount interest in the resources.

With all respect, this simply begs the constitutional question rather than answering it. Indeed, the ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. If the right must yield here to countervailing governmental interests, the relation-back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them.

Under developed principles defining the qualified right to counsel of choice, the dispositive issue is whether there

As indicated in the panel opinion, 814 F.2d at 927, such a holding obviously would not prevent forfeiture of assets transferred to attorneys in fraudulent or sham transactions, nor would it prevent any forfeiture that leaves a defendant with sufficient untainted resources to pay reasonable attorney fees.

are countervailing governmental interests that do justify the drastic expedient of freezing and ultimately forfeiting the assets of RICO and CCE defendants to the point that they cannot retain private counsel for their defense. The majority, accepting the government's arguments, first finds comfort for such defendants in the fact that other guarantees in the sixth amendment insure that even if the government effectively reduces them to indigency, they will be entitled to appointed public counsel who will then be held to minimal standards of effective assistance. By this, the majority necessarily announces the general principle that the constitutional right to private counsel of choice actually hangs on the thread of unconstrained legislative indulgence; that the only effective constraint on the legislative branch is that it may not deny defendants the back-up right to the minimally effective assistance of appointed public counsel.2

With the right to counsel of choice reduced to such modest dimensions, it may be thought fairly easy to discern countervailing governmental interests that justify its obliteration for the particular classes of defendants targeted by this legislation. Of course it is to the special quality and enormity of these crimes—organized drug dealing and racketeering on the grand scale—that Congress understandably looked in justifying the wide-ranging across-the-board criminal forfeiture provisions. And it is to the same factors that the majority now looks to find justification for the special impact of these provisions upon RICO and CCE defendants' ability to retain counsel for their defense, a special impact which, interestingly—as we all agree—Congress itself did not consider, at least so far as the statutes and legislative history reveal.

Of course these particular crimes are enormous in their dreadful consequences for our society, and their perpetrators utterly despicable. I am prepared to accept that the depredations of organized crime, particularly those involving drug dealing in contemporary society, rank just behind human slavery among the sorest domestic afflictions of our history. But I do not believe that the enormity of particular crimes and types of criminal activity and the despicability and power of particular types of criminals can properly be weighed in this particular constitutional balance. In my view, the right to private counsel of choice guaranteed by the sixth amendment cannot be made to turn on how bad the particular crime or criminal may be, but that, I think, is the linchpin of the majority's constitutional analysis.<sup>3</sup>

For these reasons, I remain persuaded that the sixth amendment prevents governmental freeze orders and for-feitures whose effect is to deprive criminal defendants of their ability, otherwise present, to employ private counsel for their defense against the underlying charges on which the freeze order or forfeiture is based.

HARRISON L. WINTER, C.J., and SPROUSE and ER-VIN, JJ., have asked to be shown as joining in this dissenting opinion.

<sup>&</sup>lt;sup>2</sup> This case of course only deals with the sixth amendment rights of RICO and CCE defendants. But the majority's analysis of the tenuous nature of the right to private counsel of choice as against the government's powers of forfeiture obviously sweeps wider.

<sup>&</sup>lt;sup>3</sup> Judge Murnaghan apparently finds additional comfort in the fact that the forfeiture provisions simply put criminal defendants and their lawyers in the same position as that of civil plaintiffs and their lawyers operating under contingent fee contracts. The constitutional irrelevance of that analogy is so obvious that, with all respect, one wonders if the real thought is not that there are also bad lawyers to be taken into account in assessing the governmental interests at stake. Of course Congress advanced no such justification, and there is nothing in this record to support such a view. In any event, the constitutional infirmity I would find would reward no such lawyers.

#### APPENDIX B

# UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 86-5025, 86-5050 and 86-5069

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V

LEON DURWOOD HARVEY,

Defendant-Appellant,

V

National Association of Criminal Defense Lawyers (NACDL); National Legal Aid and Defender Association (NLADA); and American Bar Association (ABA), Amicus Curiae.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

V.

CAPLIN & DRYSDALE, CHARTERED, Claimant-Appellee,

and

CHRISTOPHER F. RECKMEYER, II; ROBERT BRUCE RECKMEYER,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

V.

Ronald Burnell Bassett
a/k/a Ronnie Bump, a/k/a The Kid, a/k/a Zachary Jackson,
a/k/a Ronald Jackson, a/k/a Beamon Jackson,
a/k/a Ronald Jones, a/k/a R.F. Jones, a/k/a Beamon West,
a/k/a Harry VanDyke, a/k/a The Bird;

CLARENCE MEREDITH
a/k/a Yo, a/k/a Magic, a/k/a/ Houdini, a/k/a Uncle Willie,
Defendants-Appellees.

Argued Sept. 4, 1986. Decided March 6, 1987.

Before PHILLIPS, ERVIN and CHAPMAN, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

These three cases, consolidated for purposes of appeal, present important issues respecting the forfeiture provisions of the Comprehensive Forfeiture Act of 1984, ch. 3, Pub.L. No. 98-473, §§ 301 et seq., 98 Stat.1976 (1984) (the Act) (codified at 18 U.S.C. § 1963 (RICO) and 21 U.S.C. §§ 848, 853 (CCE)).

In two of the cases, Nos. 86-5069 and 86-5050, the government appeals district court orders exempting legitimately contracted attorney fees from forfeiture; in the third case, No. 86-5025, the defendant appeals his conviction on the basis that pre-trial restraining orders which forced indigency upon him violated his sixth amendment right to counsel and his fifth amendment right to procedural due process.

Together, the appeals require us to consider (1) whether Congress intended by the Act to authorize pre-conviction restraints on transfer and ultimate forfeiture of property legitimately contracted by defendants to be paid as attorney fees, on the basis alone that the attorney had reasonable cause to believe that the property was subject to forfeiture upon defendant's conviction; (2) if so, whether such an application of the Act would violate either or both the constitutional right to counsel secured to defendants by the sixth amendment, and the associated right to a fundamentally fair trial secured by the fifth amendment; and (3) whether, in any event, post-indictment ex parte restraints on transfers of property, as permitted by the Act solely on the basis of allegations in the indictment, without any opportunity for immediate post-restraint hearing, violate fifth amendment rights to procedural due process.

We hold that the Act was intended by Congress to permit such pre-conviction restraints on transfer and ultimate forfeiture of property legitimately contracted to be paid as attorney fees, but that such an application violates the qualified right to counsel of choice secured by the sixth amendment. We further hold that post-indictment ex parte restraints on property transfers, as permitted by the Act, violate fifth amendment procedural due process rights where no opportunity for an early post-restraint hearing is afforded but that here the error of entering such an order was harmless and, in any event, no basis for reversing the conviction.

On this basis, we affirm the orders exempting legitimate attorney fees from forfeiture in Nos. 86-5069 and 86-5050 and the criminal conviction in No. 86-5025.

1

The Act significantly revised existing forfeiture provisions in the RICO and CCE statutes by expanding the

reach of forfeiture in relation to offense, the types of property subject to forfeiture, and the time frame within which ownership of property subjects it to forfeiture; by liberalizing the provisions for restraining orders or injunctions against transfers of potentially forfeitable property; and by providing a procedure by which third parties can assert, after a defendant's conviction, their interest in property subject to forfeiture. We summarize and briefly analyze those provisions most salient to these appeals.<sup>1</sup>

New 18 U.S.C. § 1963(a)(3) adds<sup>2</sup> to the basic reach of the forfeiture provisions "(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." This expanded the reach of the forfeiture provisions from property "associated with" the criminal enterprise to include as well "property derived from the profits" of the criminal enterprise.

New subsection (b) makes clear that all types of property within the defined reach of the Act is subject to forfeiture:

- (A) interest in;
- (B) security of;
- (C) claim against; or
- (D) property or contractual right of any kind affording a source or influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

For convenience, the specific references and citations we use are to the RICO forfeiture provisions, but because these are virtually identical to the CCE provisions the references serve for both.

<sup>2</sup> Subsection (a) previously reached only, and still reaches:

<sup>(1)</sup> any interest the person has acquired or maintained in violation of section 1962; [and]

<sup>(2)</sup> any-

- (b) Property subject to criminal forfeiture under this section includes—
- (1) real property, including things growing on, affixed to, and found in land; and
- (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

Even more critical than these expansions of forfeiture's reach and of the types of property subject to forfeiture, and most critical to the issues before us, is a new provision that the government's interest in property subject to forfeiture arises at the time the charged offense is committed rather than, as formerly, at the time of the defendant's conviction. Subsection (c) now provides that:

(C) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

This "relation-back" provision was designed to close a loop-hole in the existing statutes that had permitted defendants to escape in personam forfeiture by transferring assets to third parties before conviction. S.Rep. No. 225, 98th Cong., 1st Sess. 200-01, reprinted in 1984 U.S.Code Cong. & Ad.News, 3182, 3383-84 [hereinafter cited as Senate Report].

The rights of third parties who claim an interest in property sought to be forfeited are now provided in new subsections (j) and (m). Subsection (j) prohibits third parties from intervening in the trial or appeal of a criminal case involving forfeiture and from commencing an action challenging the government's alleged interest in property that has been alleged to be subject to forfeiture in an indictment on information. Subsection (m) then relegates third parties to asserting their interests in post-conviction proceedings:

(m) ... (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may ... petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

Subsection (m)(6) specifies the showing a third party is required to make to have her property relieved of the forfeiture. The court will exempt the property from forfeiture only if the third party is able to show that:

- (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
- (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

The 1984 amendments also broaden, in ways critical to the issues before us, the Government's power to obtain preconviction orders restraining the defendant's use of property alleged to be subject to forfeiture. Subsection (e)(1) authorizes the Government to seek and the courts to enter injunctions and restraining orders either before or after the defendant is indicted. Such orders may issue before indictment only after notice and hearing unless the government demonstrates ex parte that there is a substantial probability that the property will be proven at trial to be subject to forfeiture and that giving notice would jeopardize the availability of the property for forfeiture. In that case, an ex parte order may be issued but it must expire within 10 days, and a hearing concerning such an order, if requested, must be held as early as possible. After indictment, however, restraining orders may be issued on the basis alone of the indictment's allegation that the property described would be subject to forfeiture upon conviction; no special judicial hearing either before or after entry of the order is required.

Together, these new RICO and CCE forfeiture provisions obviously enhance greatly the power of the government to restrain a defendant's use of his property before conviction and expand greatly the scope of assets subject to forfeiture after conviction. Each of the cases consolidated on this appeal concerns the proper interpretation and application of one or more of these new forfeiture provisions.

In each case the Government has invoked the new provisions in ways that prevent the defendants from paying (or their attorneys from receiving or retaining) agreed fees. Although the cases then raise common questions of law, each arises in a different factual setting and reaches this court in a different procedural posture that requires separate statement.

II

A.

United States v. Bassett and Meredith (Bassett)

Appellees Bassett and Meredith were indicted in the District of Maryland on December 20, 1985, for various offenses, including conducting a continuing criminal enterprise. The indictment included an allegation that Bassett and Meredith should forfeit to the United States any profits derived from their alleged enterprise. Five weeks after the return of the indictment, without seeking a restraining order, the Government notified counsel for appellees that it would seek forfeiture of fees paid them by appellees should appellees be convicted. Appellees' counsel responded by moving for an exemption of their fees from the forfeiture count, asserting that their continued representation of appellees was conditioned on receiving payment of their fees.

The district court granted counsel's motion on April 11, 1986. Although it found that the literal language of the Act appeared to permit the forfeiture of attorneys fees, the court concluded from its review of the legislative history that Congress had intended to require the forfeiture of property held by third parties only when the transfer of assets was the result of a "sham" or "fraudulent" transaction. The court stated that although the appellees attorneys could not be accounted as "innocent as bona fide purchasers for value," they also were not merely "bogus conduits" of the defendants' ill-gotten goods. Because the attorneys received their fees as the result of an arms' length transaction, the court held that the Government could not seek the forfeiture of such fees under the Act as properly interpreted.

The district court considered that its statutory interpretation was bolstered by the sixth amendment violations threatened by a contrary interpretation. The court noted defendants have a qualified sixth amendment right to counsel of their choice so long as they had the resources to retain such counsel. The threat of forfeiture of attorneys fees upon conviction might deprive defendants of this right by making it far less likely that an attorney would accept their case. Further, the already overtaxed resources of the public defender's office probably could not adequately handle the exceedingly complex cases it would then receive. The court also noted that in cases in which the Government threatened forfeiture the defendant might be both unable to obtain private counsel and ineligible for a court-appointed attorney. The court found it appropriate therefore to avoid these potential sixth amendment problems by interpreting the statute as not permitting the forfeiture of legal fees contracted for in a bona fide transaction.

The Government seeks a reversal of the district court's order on grounds that the court's interpretation of the statute is legally erroneous. The Government contends that the literal language of the statute permits the forfeiture of attorneys fees and that the legislative history does not support a contrary interpretation.

B.

United States v. Caplin & Drysdale (Reckmeyer)

The firm of Caplin & Drysdale began its representation of defendant Christopher F. Reckmeyer in the summer of 1983, over 18 months before a grand jury investigation led to his indictment in the Eastern District of Virginia on various offenses, including a charge of operating a continuing criminal enterprise. The January 15, 1985, indictment included a forfeiture count that sought forfeiture of virtually all Reckmeyer's assets. On January 14, 1985, the day before the indictment was returned, the Government obtained an ex parte restraining order barring the transfer of assets covered by the indictment.

Throughout its representation to that point, Caplin & Drysdale had received regular payments from Reckmeyer, including a payment of \$25,480 on January 25, 1985, the day Reckmeyer surrendered to authorities. The firm notified the court of its receipt of these funds, which were thereupon deposited in a separate escrow account. At Reckmeyer's request, the firm continued its representation of him after the indictment.

On March 14, 1985, Reckmeyer pled guilty to three counts of the indictment. The following day the court denied counsel's motion to exempt its fees from the restraining order on the ground that Reckmeyer had pled guilty to conducting a continuing criminal enterprise. Upon Reckmeyer's conviction on May 17, 1985, the court entered a forfeiture order that included virtually all of Reckmeyer's assets and the \$25,480 held in escrow by Caplin & Drysdale. On June 17, 1985, Caplin & Drysdale filed a third-party claim pursuant to \$413(n) of the CCE Act asserting an interest in the amount of \$170,000, representing unpaid legal fees. In it they asserted that because forfeiture of their fees would violate Reckmeyer's sixth amendment right, those fees must be exempted.

The court granted Caplin & Drysdale's motion to exempt its fees from forfeiture on March 27, 1986, 631 F.Supp. 1191. Unlike the court in Bassett, which found that the Government could not reach assets held by any third parties unless the transfer was a sham or otherwise fraudulent, the district court here found only that Congress did not intend for bona fide attorneys fees to be subject to forfeiture under the CCE. The court agreed, however, with the Bassett court's conclusion that an interpretation of the statute that permitted the forfeiture of attorneys fees would violate the defendant's sixth amendment rights to counsel of choice and to the effective assistance of that counsel.

In this appeal the Government contends, as in Bassett, that forfeiture of legitimate attorneys fees was intended under the Act and does not in general violate the sixth amendment.

C.

United States v. Harvey (Harvey)

Appellant Harvey was indicted in the Eastern District of Virginia on October 16, 1985, for over 20 different offenses including various RICO offenses and operating a continuing criminal enterprise. The indictment included an allegation that all of Harvey's assets should be forfeited to the United States. On the same day, the Government obtained in an ex parte hearing a restraining order that barred Harvey from making any use of any of his property, including currency and accounts, until the conclusion of his trial and all appeals. This restraining order was then served on Harvey's attorney, John Mark of Zwerling, Mark, Ginsberg and Lieberman, P.C., who had already begun work on Harvey's case.

The court denied Mark's request that his firm be permitted to make an appearance in the case conditioned on the exemption of their fees from the restraining order. In a subsequent hearing the court also denied the firm's motion to exempt its fees from the restraining order. The court, however, acknowledged that the restraining order rendered Harvey indigent and appointed Mark's law partner, John Zwerling, to represent Harvey. A request that all four members of the firm be appointed was denied, but the court did agree to appoint two members of the firm, so long as one of them was Zwerling. The court permitted Zwerling to decide whether Mark or Lieberman would assist him.

After denial of its motion to withdraw because it lacked the resources necessary to prepare an adequate defense, counsel filed numerous motions to be allowed to retain various experts with Criminal Justice Act funds and a motion to be allowed to utilize the assistance of another member of their firm. These motions were largely denied, although the court did permit counsel to retain an accountant and a psychiatric expert. Nevertheless, as counsel have summarized the situation in their brief, "[t]he preparation for trial bore no resemblance to the preparation that normally would and should, but could not, be undertaken prior to a trial of this magnitude."

After a three-day bench trial, Harvey was convicted of most of the charges on which he had been indicted, including the RICO and continuing criminal enterprise offenses. The district court then ordered forfeiture of all property described in the RICO and CCE counts. Harvey now seeks a reversal of his conviction on grounds that his sixth and fifth amendment rights were violated. Harvey contends that by refusing to exempt attorneys fees from forfeiture the court violated his sixth amendment right to counsel of his choice. He also asserts that the *ex parte* restraining order prohibiting use of his assets to retain counsel of his choice violated his fifth amendment procedural due process rights.

#### III

The threshold question presented by each of these appeals is whether Congress intended the Act to make legitimately contracted for or paid attorneys' fees subject to forfeiture and pre-conviction restraint. If Congress did not so intend, the principal substantive issue in each appeal must be resolved against the government and there will be no need for this court to address the fifth and sixth amendment issues.

As indicated, the district courts in both Bassett and Reckmeyer, relying principally upon legislative history, interpreted the forfeiture provisions of the Act as not being intended to reach property contracted for or paid as

attorney fees unless the transaction was a sham or fraudulent one intended to defeat the government's entitlement to forfeiture. Because there was no suggestion of sham or fraud in either case, the courts in both granted requested exemptions from forfeiture.

Though the Bassett and Reckmeyer courts' statutory interpretation finds support in a majority of the federal decisions to date on the point3 we disagree with that interpretation and reject it. We think instead that the language of the relevant forfeiture provisions is so clear and so plainly reaches property legitimately contracted to be paid or paid as attorneys fees as not to permit judicial resort to legislative history to resolve ambiguity on the point or to avoid a manifestly unintended application. Further, we think that even if resort to legislative history were made, examination of that history would reveal no such clear intent to exclude property marked for or paid as attorney fees as would be required to compel such an interpretation, and indeed would tend rather to confirm the contrary intention reflected in the plain statutory language. Finally, we believe that the plain language of the forfeiture provisions does not permit a judicial interpretation that avoids the serious constitutional questions generally conceded by all to exist.

Statutory construction properly begins with examination of the literal language of a statute, United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), and it properly ends there unless the language is ambiguous, id., or would, as literally read, contravene a clearly expressed legislative intention, Russello v. United States, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). Here, we are satisfied that the literal language of the statute is not ambiguous, that an interpretation of that language according to its plain meaning contravenes no clearly expressed legislative intent, and that such an interpretation is therefore the proper one. A simple parsing of the critical forfeiture provisions shows why.

Those forfeiture provisions have two elements. The first defines, in two ways, property interests subject to forfeiture: by relation of property to offenses charged, § 1963(a) and by kind, § 1963(b). Attorney fees are neither expressly excluded nor included; they are not mentioned. The second element then describes the only two conditions upon which property generally subject to forfeiture under §§ (a) and (b) may be exempted by third party claims of superior title: proof of title superior to that of defendant at the effective date of forfeiture, § 1963(m)(6)(A); and proof of title superior to that of the government by subsequent transfer to the claimant as a "bona fide purchaser," § 1963(m)(6)(B). Again, attorney fees are not expressly singled out for special treatment; they are not mentioned.

Simply put, the literal language of these critical forfeiture provisions unambiguously includes within the property interests that are made subject to forfeiture under §§ 1963(a) and (b) property contracted to be paid or paid as attorneys fees, and then just as unambiguously subjects such property, if subject to forfeiture, to the same conditions for exemption provided for all forfeitable property by §§ 1963(m)(6)(A) and (m)(6)(B). Property marked for or paid as attorney fees is necessarily included within that defined as subject to forfeiture by §§ 1963(a) and (b) for

States v. Figueroa, 645 F.Supp. 453 (W.D.Pa.1986); United States v. Figueroa, 645 F.Supp. 453 (W.D.Pa.1986); United States v. Ianniello, 644 F.Supp. 452 (S.D.N.Y.1985); United States v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y.1985) (expressly disagreeing with Payden, cited infra, from same district); United States v. Rogers, 602 F.Supp. 1332 (D.Colo.1985). Contra United States v. Harvey, No. CR-85-224-A (E.D. Va. Nov. 8, 1985) (on this appeal); In re Grand Jury Subpoena Duces Tecum dated January 2, 1985 (Payden), 605 F.Supp. 839 (S.D.N.Y.1985) (expressly disagreeing with Rogers analysis); see also Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 Va.L.Rev. 493 (1986) (arguing that forfeiture of legitimate attorneys' fees was intended by Congress) [hereafter cited as Brickey, Forfeiture].

the simple reason that those provisions define forfeitable property without regard to its intended or actual use, whether for payment to attorneys or for other uses. Similarly, the conditions for exemption by virtue of superior title are defined in §§ 1963(m)(6)(A) and (B) without reference to the professional or other status of title claimants. Under the literal language of the forfeiture provisions, therefore, property contracted to be paid or paid as attorney fees may first be included as forfeitable property and may then not be subject to exemption, depending solely upon the particular facts that determine inclusion and exemption of property in general.

While recognizing that these critical statutory provisions seemed literally to contemplate the forfeitability in some cases of property legitimately marked for or paid as attorney fees, the district courts in Bassett and Reckmeyer nevertheless rejected that interpretation. United States v. Bassett and Meredith, 632 F.Supp. 1308, 1311 (D.Md.1986); United States v. Reckmeyer, 631 F.Supp. 1191, 1195 (E.D.Va.1986); see also United States v. Badalamenti, 614 F.Supp. 194, 196 (S.D.N.Y.1985). Instead, they held forfeiture was intended by Congress only when the attorney fee transaction could be shown to be a sham or fraud designed to defeat the government's forfeiture rights. To reach this conclusion these courts resorted to legislative history and found there a congressional intention to exempt such property.

As indicated, this conclusion has also been reached by a majority of the other district courts that have addressed the issue. It cannot, therefore, lightly be discounted. Indeed the near unanimity to date of district courts in rejecting a literal interpretation of this important federal statute is rather remarkable in itself. Certainly it bespeaks a substantial and widespread concern by these base-line federal courts with the practical and policy implications of a literal interpretation. In effect, these courts seem to be saying that they simply cannot believe that Congress could

have intended, despite the statute's literal import, that these forfeiture provisions reach legitimately contracted attorney fees, given the impact of such an interpretation upon the ability of defendants in criminal cases to arrange privately for their defenses.

Without discounting the practical and policy concerns expressed by these courts, we nevertheless cannot agree with their conclusion. We believe instead that legislative history confirms that Congress indeed intended, as the Act literally provides, that property legitimately contracted for or paid as attorney fees might be forfeitable in particular cases.

The courts that have found a contrary legislative intent have found that intent principally in passages of legislative history related to the "bona fide purchaser" exemption provisions of §§ 1963(c) and (m)(6)(B). These courts have emphasized that, for extrinsic reasons, these provisions actually disfavor attorneys in relation to all other transferees. By virtue of their special knowledge and relationships with defendants, attorneys are more likely than any other type of transferee to be unable to satisfy the condition that they be "reasonably without cause to believe that the property was subject to forfeiture." This special disadvantage created sub silentio by the statutes' failure to single attorneys out for preferential treatment as trans-

Defendants seek without great zeal to make something of the ambiguity of the term "purchaser" as applied to "sellers" of services such as attorneys. In this, however, they meet themselves coming back, for attorneys must qualify as "purchasers" in order to invoke the exemption provisions of the Act. In any event, legislative history makes it plain, if resort to it were required, that "purchasers" in this context was intended to apply to providers of services as well as to other transferees for value. See Senate Report at 200 n. 28, 1984 U.S. Code Cong. & Ad. News at 3383 (citing with approval United States v. Long, 654 F.2d 911 (3d Cir.1981), which upheld forfeiture of property transferred as attorney fees under pre-indictment Act, as illustrative of intended operation of relation-back provision of amended Act).

ferees has been the principal point then seized upon by courts in rejecting a literal reading of the statutes. The perceived anomaly of making attorney fees specially vulnerable to rather than specially protected from forfeiture by this means has seemed to these courts so great and so threatening to constitutionally secured rights to counsel as to justify the search for a contrary or limiting intent in legislative history.

The principal passages relied upon and the basis upon which courts, including the district courts in Bassett and Reckmeyer, have found in them a legislative intent at odds with a literal reading of the statutes can be briefly summarized. A portion of a Senate Report, referring to the provision in § 1963(m)(6)(B) for proof by third persons of "bona fide purchaser" status, explained in a footnote that

The provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in [§ 1963(c)]...

Senate Report at 209 n. 47, 1984 U.S.Code Cong. & Ad. News at 3392 n. 47.

Another portion of that Report referring to the relationback provision of § 1963(c) and its effect upon subsequent transfers, explained that

The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arms' length" transactions.

Senate Report at 200-01, 1984 U.S.Code Cong. & Ad.News at 3383-84.

Finally, the House Judiciary Committee, in the course of describing the intended purpose and workings of pretrial restraining orders under related forfeiture provisions in the Comprehensive Drug Penalty Act of 1984, stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment Right to counsel." H.R.Rep. No. 845, part 1, 98th Cong., 2d Sess. 19 n. 1 (1984) (House Report).

From these passages the district courts in Bassett and Reckmeyer, following other district courts, found a legislative intent to confine the forfeitability of attorney fees to situations where the fee transaction was "a sham or fraudulent" one designed to avoid forfeiture by using the attorney as a mere conduit for shielding the property. See Bassett, 632 F.Supp. at 1315-16; Reckmeyer, 631 F.Supp. at 1195. Under this construction Congress intended that attorney fees should not be subject to pre-trial restraining orders or to ultimate forfeiture so long as the fee transaction was conducted "at arms length and not as . . . part of an artifice or sham to avoid forfeiture." United States v. Rogers, 602 F.Supp. 1332, 1348 (D.Colo.1985). In coming to this conclusion, the courts have expressly relied upon a belief that such a limiting interpretation was compelled as to attorney fees to avoid serious constitutional questions respecting the right to counsel. Bassett, 632 F.Supp. at 1316-17; Reckmeyer, 631 F.Supp. at 1194-98.

The upshot of such an interpretation is flatly to read out of the "bona fide purchaser" provision the literal requirement that attorneys, like all claimants, be without reasonable cause to believe that their fees might be payable out of property subject to forfeiture, and to substitute the much more modest requirement that the fees shall have been legitimately contracted for legal defense services, without regard to the attorney's knowledge of the possible taint of the fees' source. As indicated, we do not believe that such a drastically narrowing interpretation can be justified, either on the basis of resolving facial ambi-

guity in the statutes, or of rejecting a literal interpretation that contravenes a clearly expressed legislative intent, or of avoiding serious constitutional questions.

The statutory provisions are simply not facially ambiguous, as our parsing of the critical language has demonstrated. Courts that have found an opening wedge of ambiguity have found it not in what the provisions say, but in what they do not say, see Reckmeyer, 631 F.Supp. at 1195 (no express mention of counsel fees); Bassett, 632 F.Supp. at 1131 (no express indication of how "without cause to believe" requirement applies to special case of defense counsel), or in the perceived anomaly of applying what the provisions literally say to permit forfeiture of attorney fees, see Badalamenti, 614 F.Supp. at 196 ("would raise . . . constitutional and ethical problems").

But this will not do. It is an elementary and profoundly important canon of statutory construction that ambiguity cannot be bootstrapped in these ways. "The proper function of legislative history is to solve, and not create an ambiguity." United States v. Rone, 598 F.2d 564, 569 (9th Cir.1979) (citing United States v. Blasius, 397 F.2d 203, 206 (2d Cir.1968)); see also Ex Parte Collett, 337 U.S. 55, 61, 69 S.Ct. 944, 947-48, 93 L.Ed. 1207 (1949) ("plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction . . . , may furnish dubious bases for inference in every direction").

Nor do the passages of legislative history relied upon by those courts reveal a clearly expressed legislative intention that would be contravened by applying the provisions according to their literal language. Rejection of the literal interpretation is therefore not justified under the venerable principle applied in such cases as Russello, 464 U.S. at 20, 104 S.Ct. at 299; that mandates deference to a clearly expressed legislative intention when that inten-

tion would be undercut by a specific application of a statute's literal import.

Though both of the first two quoted excerpts from legislative history do emphasize that a central concern behind the relation-back provisions was to void sham and fraudulent transfers, they cannot fairly be read to identify this as the exclusive concern. A legislative intent more restrictive than that reflected in the literal sweep of a statute cannot be inferred from the fact alone that the statute as plainly written sweeps more broadly than the central concern that prompted its enactment. See, e.g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 110-11, 100 S.Ct. 2051, 2057-58, 64 L.Ed.2d 766 (1980) (that statute literally affects broader range of conduct than the conduct of principal concern to Congress does not justify interpretation restricting application to conduct of principal concern); United States v. Lee, 726 F.2d 128, 131 (4th Cir.1984) (plain meaning of statute cannot be avoided "merely by showing that Congress . . . was largely concerned with a [different type of specific conductl").

That Congress' concern ran more broadly than just to sham and fraudulent transfers is in fact the much more plausible reading of the whole of the relevant legislative history. For example, the first portion of legislative history quoted above was a footnote to a passage of text in the Senate Report that reflected the wider concern by simply citing the text of the "bona fide purchaser" provision as defining one of the two bases upon which a third party claim of superior title might prevail. In this context, the footnote is best read as simply emphasizing that sham and fraudulent transfers would obviously fall within the category of voidable transfers.<sup>5</sup>

<sup>&</sup>lt;sup>5</sup> Perhaps significantly, the influential opinion in Rogers, 602 F.Supp. at 1332, was able to find in this passage an exclusive concern with

Even more telling is another passage of the Senate Report explaining the need for adding the relation-back provision to then current RICO forfeiture provisions.

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition. But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable so that improper pre-conviction transfers may be voided.

In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture.

Senate Report at 196; 1984 U.S.Code Cong. & Ad.News at 3379 (emphasis added).

This passage reflects a clear congressional intent to make voidable a wider range of asset transfers than just sham or fraudulent ones. Certainly the thought reflected is not contravened by the literal language of §§ 1963(c) and (m)(6)(B) which makes voidable all transfers except those to persons who qualify as "bona fide purchasers" in the

classic sense of being "without notice," a state of knowledge or belief obviously short of being "without fraud."

We are therefore persuaded that the legislative history reflects no clearly expressed intention that attorney fees should only be forfeitable when based on "sham or fraudulent" transactions or when not negotiated "at arms length." The plain language of the statute cannot therefore properly be rejected on the basis that it contravenes any contrary legislative intent to be found in legislative history. And to the extent that the district courts in Bassett and Reckmeyer thought that the statutes' plain language must be rejected to avoid an anomalous result in regard to attorney fees, "[t]he short answer is that Congress did not write the statute that way." North Carolina Department of Transportation v. Crest Street Community Council, \_\_ U.S. \_\_\_\_, 107 S.Ct. 336, 341, 93 L.Ed.2d 188 (1986) (quoting Garcia v. United States, 469 U.S. 70, 79, 105 S.Ct. 479, 485, 83 L.Ed.2d 472 (1984) (quoting Russello, 464 U.S. at 23, 104 S.Ct. at 300 (quoting United States v. Naftalin, 441 U.S. 768, 773, 99 S.Ct. 2077, 2082, 60 L.Ed.2d 624 (1979))).

Finally, that the forfeiture provisions raise serious constitutional questions does not justify a saving interpretation in these cases. The familiar and important principle is that when a statute is fairly susceptible to more than one interpretation, the interpretation most consistent with constitutionality should be adopted. See, e.g., United States v. Rumely, 345 U.S. 41, 45, 73 S.Ct. 543, 545-46, 97 L.Ed. 770 (1953). But this of course contemplates that the statute be sufficiently ambiguous to permit a judicial choice between more than one permissible reading. Id. at 45, 73 S.Ct. at 545 (choice between "fair alternatives" must favor that which avoids serious constitutional questions); Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932) ("cardinal principle that ... Court will first ascertain whether a construction . . . is fairly possible . . . by which the [constitutional] question may be avoided");

sham and fraudulent transactions by expressly implying in it a critical thought not literally expressed. *Id.* at 1347 (quoting: "The provision should be construed to deny relief [only] to third parties acting as nominees or who have knowingly engaged in sham or fraudulent transactions.") (bracketed insertion by the court).

see also 2A Sutherland, Statutory Construction § 45.05 at 15-16 (courts not free to interpret in violation of congressional intent even if only so may constitutionality be preserved).

Here, as our discussion of the plain meaning of the critical provision has shown, the statutory language simply presents no opportunity for choice between "fair alternatives." The House Judiciary Committee Report referring to possible constitutional questions in respect of related forfeiture provisions does not aid defendants on this point. The cryptic statement that "nothing in this section [providing for pre-trial restraining orders] is intended to interfere with a person's Sixth Amendment Right to counsel" obviously does not alter what the forfeiture provisions say. To the extent it is at all relevant to consider the significance of this statement, its probable meaning and purpose are too unclear to aid statutory interpretation. It may reflect no more than a reassuring political gesture to members of Congress concerned about possible constitutional problems. It may merely disclaim any intention to enact legislation thought to be unconstitutional, or it may merely express a belief that the provisions as written do not violate constitutional rights or that specific applications will of course be subject to constitutional challenge in the courts. On no possible reading could this comment be taken as a clearly expressed congressional intention that attorneys fees should only be forfeitable when based upon sham or fraudulent transactions.

For these reasons we disagree with the statutory interpretation of the district courts in Bassett and Reckmeyer

and affirm that of the district court in *Harvey*. With the latter court, we hold that the critical provisions must be interpreted according to their literal import and that this contemplates the forfeiture of attorney fees in any circumstances where the attorney cannot establish that he was "without reasonable cause to believe that the property [used to pay the fees] was subject to forfeiture."

#### IV

Having decided that the Act contemplates no special exemption of attorneys' fees from forfeiture, we turn to the issues whether and to what extent the constitution nevertheless compels such an exemption, and whether the Act provides constitutionally sufficient procedural protections in connection with the forfeitures and restraints on property transfers that it allows. A preliminary analysis of the parties' constitutional contentions may help to narrow the scope of these difficult issues and to put them in proper perspective for discussion.

First off, the defendants' constitutional challenge is a multi-faceted one which involves both substantive and procedural rights. In essence, though they do not put it just this way, defendants claim that when the government proceeds under the Act—whether by order or threat—to deprive defendants of the right to transfer property to pay legitimate attorneys' fees, two distinct though contextually intertwined substantive rights are implicated: the right to hold and use property free of governmental deprivation without the due process guaranteed by the fifth amendment, and the right to counsel guaranteed (primarily) by the sixth amendment. And they assert that because substantive property rights are implicated, so necessarily are procedural due process rights in connection with deprivations of that property.

The government does not—could not—contest that substantive property rights and concomitant procedural due

<sup>&</sup>lt;sup>6</sup> Because we consider these reasons sufficient, we need not address the disputed question whether this court's pre-amendment decision in *United States v. Raimondo*, 721 F.2d 476 (4th Cir.1983), has already decided, with binding effect upon this panel, that Congress intended by the Act to subject attorney fees to forfeiture on the same basis generally controlling third party transfers.

process rights are necessarily implicated by the forfeiture and restraint provisions of the Act. This is a self-evident proposition without regard to the intended use of the property—whether to pay attorneys fees or otherwise. Indeed, the Act reflects awareness of the need to provide procedural due process in connection with property deprivation, whatever the property's use and whether the deprivation is by pre-conviction restraining orders or post-conviction orders of forfeiture. As to the procedural right, however, the government of course takes the position that the Act's procedural protections supply the process due. Defendants on their part do not challenge the adequacy of the procedural protections except to the extent that the defendant in *Harvey* seeks to challenge the procedures provided in respect of post-indictment restraining orders.

In sum, no one questions that fifth amendment procedural due process rights are implicated by restraining orders and forfeiture orders affecting a defendant's property contracted or paid as attorneys fees. The only dispute touching those rights is that in *Harvey* as to the adequacy of the procedures provided in conformity with the Act for the post-indictment restraining order in that case.

The much more difficult issue is whether any sixth (or fifth) amendment substantive right to counsel independent of the unquestioned property right is also implicated by restraining orders and forfeiture orders directed at attorneys' fees. As to this, the government contends that no such right to counsel is implicated, at least not by the Act as written and as applied in these cases. Conceding that specific misapplications of the Act might involve arbitrary or overreaching conduct by the government in violation of the fifth amendment right to a fundamentally fair trial, or outright denials of counsel or the effective assistance of counsel in violation of the sixth amendment, the government contends that no such claim has been made or could be made in any of these cases. In any event, the government asserts, no outright denial of counsel, or in-

effective assistance of counsel, or fundamentally unfair trial claim could properly be entertained until after conviction had laid the basis for assessing (or, in respect of an outright denial claim, assuming) actual prejudice. Furthermore, even if it be assumed that in strict conformity with the Act, defendants might be made financially unable to employ private counsel by virtue of restraining orders, this would not involve the outright denial of counsel, given the right to appointed counsel by virtue of indigency that would then arise (as actually occurred in Harvey). Finally, the government contends that restraining and forfeiture orders under the Act implicate no sixth amendment right to counsel of choice. That right, according to the government, is a stringently qualified one that has been recognized only in exceptional circumstances not present here. Its limits in any event are found in sufficiently countervailing governmental interests, which are present here in the necessity to prevent the pre-conviction concealment and dissipation of forfeitable property and concomitantly to cut off the economic base for further criminal activity by defendants.

The defendants contend to the contrary that the Act's forfeiture provisions as literally applied to attorneys' fees do implicate sixth amendment rights to counsel independently of any fifth amendment procedural due process rights respecting property deprivation. Essentially they argue that the mere potential under the Act for restraining orders and forfeiture orders affecting the payment of attorneys' fees (not to say any actual restraints and forfeitures) immediately and necessarily violates sixth amendment rights to counsel of choice and to the effective assistance of counsel by its in terrorem effect upon counsel and counselclient relationships. Furthermore, they say that in some circumstances, the Act as written may operate to deny any counsel when, as may well occur, private counsel are all deterred by the prospects of forfeiture but defendant cannot qualify by indigency for appointed counsel.

We will take the right to counsel and procedural due process issues in that order.

#### A.

The courts and commentators that have considered the matter, the Justice Department, and the American Bar Association generally seem to have agreed that forfeiture of attorney fees may at some point run afoul of sixth amendment rights to counsel and, possibly, congruent fifth amendment rights to a fundamentally fair trial. Every court which to date has interpreted the Act as not intended to reach attorneys' fees untainted by sham or fraudulent transactions has done so on the basis, in part. that wider forfeiture would at least raise serious sixth amendment questions which should and can be avoided.7 The Justice Department, while maintaining that "there are no constitutional ... prohibitions" to the wider forfeiture of attorney fees in accordance with the Act, has nevertheless, in obvious response to court decisions and objections by the organized bar, promulgated formal guidelines designed to temper the conceded impact of forfeiture upon defense counsels' "ability to represent their clients." Justice Department Guidelines on Forfeiture of Attorneys' Fees, reprinted in 38 Crim.L.Rep. (BNA) 3001, 3003.8 The

American Bar Association, which appears as amicus curiae on this appeal, advises that it has taken formal positions opposing attorney fee forfeitures except in sham or fraud situations, and contends on this appeal that those positions are grounded in sixth amendment considerations. Brief Amicus Curiae of the American Bar Association 12-17. While the commentators are divided in their assessments of sixth amendment questions, none seems to have doubted that a genuine question exists.

those aspects, presumably to guard against constitutional challenges to particular applications.

In a preamble, the Department "recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the [bona fide purchaser] requirements ... without hampering their ability to represent their clients" and specifically, that holding attorneys to the general "without cause to believe" standard "may prevent the free and open exchange of information between an attorney and a client." Justice Department Guidelines on Forfeiture of Attorneys' Fees, reprinted in 38 Crim.L.Rep. (BNA) 3001, 3003.

On this basis, the Department concludes that prosecutorial discretion should be exercised in applying the forfeiture provisions to attorney fees, and adopts as Department policy that no such forfeiture will be sought without prior approval of the Assistant Attorney General, Criminal Division, pursuant to specific guidelines. In their most relevant portions, these guidelines then provide for seeking forfeiture of fees for representation in criminal matters only when there are reasonable grounds to believe that a fee transaction is a sham or fraudulent one, or reasonable grounds (not acquired from compelled disclosure of confidential communications) that the attorney has actual knowledge that a particular asset received as fees was then claimed to be subject to forfeiture or that it was obtained by criminal misconduct. Further the guidelines announce a policy against giving notice to attorneys that any assets other than those specifically identified in an indictment or restraining order are subject to forfeiture in an avowed effort to avoid challenges of interference with the qualified right to counsel of choice.

\* See Brickey, Forfeiture, 72 Va.L.Rev. at 529-32 (sixth amendment violations may be litigable after conviction); Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up for Grabs?, 39 Sw.L.J. 1067, 1091 (1986) ("potential for constitutional vi-

These cases so holding cited in note 3, supra. Actually, several of these courts have seemed to hold alternatively that the Act, if intended to reach legitimate attorney fees, would violate sixth amendment rights to counsel. See, e.g., Bassett, 632 F.Supp. at 1317 (so to read the Act "is to violate Sixth Amendment principles"); Reckmeyer, 631 F.Supp. at 1196 (application of Act "to encompass bona fide attorney's fees would violate a defendant's Sixth Amendment rights"); Badalamenti, 614 F.Supp. at 198 (if intended to reach bona fide attorney fees court would "conclude that in this application it ran afoul of the Sixth Amendment").

<sup>&</sup>lt;sup>8</sup> The Justice Department guidelines are particularly interesting in their identification of the most questionable aspects of the forfeiture provisions as applied to attorney fees and in their means of ameliorating

There is thus general agreement that at some point action by government which effectively prevents a defendant from using otherwise available property to hire a lawyer to defend him against criminal charges could violate his constitutionally secured rights to counsel. But there is basic disagreement and considerable uncertainty among the courts and between defendants and the government in these cases about where that point may be, and specifically whether it lies within the range of government action specifically authorized by the Act.

Identifying, in general terms, "serious constitutional questions" in order to justify a saving statutory interpretation is obviously an easier and less serious judicial process than is identifying specific constitutional vices in statutes not subject to alternative interpretations. Certainly that is the case here. Despite the considerable difference between the two processes, however, a good starting point for deciding whether the Act violates specific constitutional rights is to marshal the "serious questions" about possible violations that courts have identified. The questions so identified all concern the potential impact of certain assumed consequences of the Act's application upon particular constitutionally secured rights.

The assumed consequences concern both the ability of defendants to retain private counsel under the threat of forfeiture, and the relationships between a defendant and any privately retained counsel who might undertake representation despite the threat. The primary consequences, as assumed by other courts, as urged by the defendants and associated amici on this appeal, and as, to some extent, conceded by the government, may be summarized as follows.

Pre-conviction restraining orders and, indeed, the mere threat of ultimate forfeiture without any such orders operate directly and immediately to inhibit a defendant's ability to retain private counsel for his defense. Counsel inevitably will be reluctant or unwilling to accept private employment knowing that they may not be able to collect or retain agreed-upon fees. See, e.g., Bassett, 632 F.Supp. at 1316-17; Reckmeyer, 631 F.Supp. at 1196-97.

Forced indigency, the ultimate consequence of freeze orders, may entitle the defendant to appointed counsel, but this is no answer. The available force of public defenders and legal aid lawyers is insufficient to provide this assurance. See Rogers, 602 F.Supp. at 1349. In any event, freeze orders and the threat of forfeiture may in some cases result in the inability to retain either private or appointed public counsel. This would occur when no private counsel would accept employment under such conditions but the defendant could not qualify as an indigent because of the availability of some untainted assets. See Badalamenti, 614 F.Supp. at 197.

If private counsel is retained despite the threat of fee forfeiture, the resulting relationship between counsel and client will necessarily be compromised by conflicts of interest respecting forfeiture possibilities. To the extent counsel's right to obtain or retain fees is dependent upon his not having "reasonable cause to believe" that the source of his fee is forfeitable under the Act, a conflict of interest respecting the tolerable depth of inquiry by counsel into the defendant's conduct is necessarily created. Further, there may arise conflicts of interest respecting plea bargain possibilities involving dismissal of forfeiture counts that might preserve attorney fee sources. See Reckmeyer,

olations accompanying [literal] interpretation is serious" but subject to avoidance by governmental discretion); Note, Forfeiture of Attorneys' Fees Under RICO and CCE, 54 Fordham L.Rev. 1171, 1193 (1986) (concluding that application of Act to attorneys' fees "creates conflicts with the defendant's sixth amendment right to counsel," but that "the problem is not fatal to the statutes"); Note, Forfeiture of Attorneys' Fees: A Trap for the Unwary, 88 W.Va.L.Rev. 825, 843 (1986) ("defendant's sixth amendment right to effective representation may be violated" by the [bona fide purchaser requirement]).

631 F.Supp. at 1197; Badalamenti, 614 F.Supp. at 196-97.

The specific constitutional rights possibly violated by these consequences have, understandably, been less certainly identified by the courts and by the defendants and their associated amici on this appeal. The following specific rights have, however, been suggested with varying degrees of precision and emphasis: the minimal or basic sixth amendment right to some counsel, as recognized, e.g., in Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938); the further sixth amendment right to the effective assistance of whatever counsel undertakes representation, as recognized, e.g., in McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); the further sixth amendment right to counsel of choice, as recognized in, e.g., Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932); and the related fifth amendment right to a fundamentally fair trial, specifically to a trial not made unfair by prosecutorial misconduct that unbalances the opposing forces of advocacy, as recognized in, e.g., Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211-12, 37 L.Ed.2d 82 (1973). Taking these as the only constitutional rights arguably implicated by the Act's impact on attorneys' fees, we consider them in turn.

We first consider whether freeze orders or the mere threat of forfeiture might violate the discrete right to the effective assistance of counsel or the related right to a fundamentally fair trial. As to these, we agree with the government that while in particular cases such violations might result from specific applications of the Act, this could be determined only after conviction. Before conviction, the mere possibility that particular applications of the Act might ultimately result in such violations could not then subject the Act to constitutional challenge in respect of these particular rights. See Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 71, 81 S.Ct.

1357, 1397, 6 L.Ed.2d 625 (1961) ("Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated."); see also Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 Va.L.Rev. 493, 529-32 (1986) (no sixth amendment right litigable before conviction). Accordingly, no challenge to the Act, either facially or as applied, on these particular grounds lies before conviction.

We next consider whether the Act facially or by particular applications might violate the "basic" right to counsel guaranteed by the sixth amendment. We start by recognizing that this is only the right to have some counsel (actually, not to be denied any counsel). This discrete right is therefore satisfied by having either privately retained or governmentally appointed counsel. When indigency prevents the private retention of counsel, a specific right to appointed counsel thereupon arises. Johnson, 304 U.S. at 463, 58 S.Ct. at 1022. The worst possible effect of the Act's application upon this minimal right could only be to force indigency upon the defendant by freeze orders. Since this creates a right to appointed counsel, a right not affected in any way by the Act, the Act does not on its face violate the minimal right, nor could it by any application other than one that included a follow-up refusal to appoint any counsel. No such application is involved in any of the cases before us.

This leaves only the possibility that the Act, either facially or by specific applications, might violate a defendant's sixth amendment right to counsel of choice. This, say the defendants, will necessarily occur whenever freeze orders actually force indigency upon a defendant, or, short of that, whenever the threat of freeze orders or ultimate forfeiture makes retention of private counsel a practical impossibility. Defendants further contend that such a violation would occur and could be determined immediately

upon the effective deprivation of counsel of choice rather than only upon a defendant's subsequent conviction. The government on the other hand contends that the indirect deprivation of private counsel of choice by governmental freeze orders or the mere threat of forfeiture under the Act would not, under any circumstances, violate this particular narrowly qualified sixth amendment right. Furthermore, says the government, just as in the case of a claim of ineffective assistance of counsel, such a claim could only be determined after a defendant's conviction.

It is this specific right to counsel of choice that the defendants and associated amici fix upon most strongly in claiming constitutional violation by applications of the Act's forfeiture provisions. It is also this right that courts seeking to avoid constitutional questions by statutory interpretation have thought most obviously threatened by the Act. See, e.g., Bassett, 632 F.Supp. at 1316; Reckmeyer, 631 F.Supp. at 1196; Rogers, 602 F.Supp. at 1348-50; cf. Badalamenti, 614 F.Supp. 197 (problem is not counsel of choice, but absolute denial of counsel to non-indigent by chilling effect). And it seems fair to say that the government on these appeals has recognized this as the right most seriously drawn in issue by the forfeiture of attorney fees.

We agree with defendants that certain applications of the Act, properly challenged on these appeals, violate the sixth amendment right to counsel of choice and that the Act is to that extent unconstitutional. To show why requires an analysis of the nature of this particular right that examination in other contexts may not have forced.

There is, beyond the minimal or basic sixth amendment right to some counsel, a component right—concededly qualified—to counsel of one's choice. See Powell, 287 U.S. at 53, 53 S.Ct. at 58. This means, in general, a right to retain private counsel of choice out of one's private resources, and up to the limit of those resources, free of

government interference. See United States v. Inman, 483 F.2d 738, 739-40 (4th Cir.1973); United States v. Burton, 584 F.2d 485, 488-89 (D.C.Cir.1978) ("accused who is financially able to retain counsel must not be deprived of the opportunity to do so"). Thus, while it has presumably never been attempted, it seems clear that any legislative attempt by general rule directly to put a cap on what persons accused of crimes could pay privately retained defense counsel, or to dictate the choice of private counsel by special qualification, or however, would be unconstitutional.

Indeed it is plain upon consideration of the way in which the contours of the sixth amendment's total guarantee have evolved that the right to be represented by privately retained counsel is the primary, preferred component of the basic right to some counsel. See Linton v. Perini, 656 F.2d 207, 209 (6th Cir.1981) ("essential component"). The companion right to appointed counsel has only emerged, rather late in the interpretive process, as an enforceable back-up right when available private resources do not permit exercise of the primary right. See Powell, 287 U.S. at 60-71, 53 S.Ct. at 60-65. It seems plain that the sixth amendment guarantee of counsel was written on the assumption that the primary right being secured against government encroachment was the right to be represented by counsel freely chosen and paid under private contract.

In view of some of the government's arguments in these appeals, it is well to recognize at the outset that this primary right to privately retained counsel contains anomalies that may appear singularly unfair and indeed positively undemocratic. For the primary, privately exercisable right is plainly an unequally distributed one. Some defendants, frequently the most unworthy as events demonstrate in the end, are able to hire the "Rolls-Royce of attorneys," cf. In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Payden), 605 F.Supp. 839, 850 n. 14 (S.D.N.Y.1985) (no right to hire "Rolls-Royce of

attorneys"), while others have to settle for considerably less in quality. But recognizing the anomaly ends the matter for purposes of this analysis. It is an irrelevancy once recognized, except as it necessarily defines technical indigency as the point at which the inability privately to exercise the primary right gives rise to the legally enforceable back-up right.

As indicated, this primary right is, however, a qualified one, and the nature of the right has indeed been worked out essentially in terms of the qualification. This has occurred primarily in cases where trial continuances were being sought to secure or preserve the services of privately retained counsel. In that context, see, e.g., Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); Sampley v. Attorney General, 786 F.2d 610 (4th Cir.1986), the right has been held qualified by the government's countervailing interest in the orderly administration of justice, see Ungar, 376 U.S. at 589, 84 S.Ct. at 849-50; Sampley, 786 F.2d at 613; see also United States v. Cunningham, 672 F.2d 1064, 1074-75 (2d Cir.1982) (right protects against arbitrary disqualification of counsel). Further specific qualifications have been recognized. Perhaps the principal one is that the right is only the right to a "fair opportunity" to choose one's counsel; it is not determined by the mere whim of an accused. See Powell, 287 U.S. at 53, 53 S.Ct. at 58; Sampley, 786 F.2d at 613. Also, the right does not embrace any guarantee of a "meaningful attorney-client relationship," Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983). In sum, it may be expressed as the right to be free of arbitrary governmental interference in choosing, paying, and retaining the services of privately retained counsel. See Ungar, 376 U.S. at 589, 84 S.Ct. at 849-50.

Though the essential nature of the qualified right has been worked out primarily in the context of motions for continuance of trial and for disqualification of counsel, the attributes of the right summarized above are applicable as well in the attorney fee forfeiture context. In this context, the issue is the extent to which legitimate governmental interests justify—make not arbitrary—governmental deprivation of the right of accused persons to choose and pay privately retained counsel by the indirect means of freeze orders and the Act's in terrorem effect upon the availability of private counsel. We accept the fact, as does the government (both in its litigation position and in the Justice Department guidelines) that the Act necessarily has that effect upon the practical ability to retain private counsel of choice.

The governmental interests asserted on these appeals are those identified in the Act's relatively sparse legislative history. Those interests are: "to preserve [by pre-conviction restraining orders] the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure [by the relation-back forfeiture provision] that he cannot as a result avoid the economic impact of forfeiture," Senate Report at 195-96, 1984 U.S.Code Cong. & Ad.News at 3378-79, and, more specifically, to strip racketeers and drug dealers of their "economic power bases" upon conviction, id. at 191, 1984 U.S.Code Cong. & Ad.News at 3374. To these specific legislative purposes, the government adds by way of argument on these appeals the manifest purpose of deterrence.

No one disputes that these governmental interests outweigh any "right" by an accused to transfer tainted property to his defense counsel, ostensibly as attorney fees but in reality as a sham to prevent forfeiture. The courts in Bassett and Reckmeyer, for example, following other district courts, saw no constitutional question respecting freeze orders and forfeiture orders directed at sham or fraudulent transfers. They found the limit of the Act's intended reach precisely on this basis. We believe instead that though Congress intended the Act to reach further, sham or fraudulent transfers define the permissible constitutional reach of the Act in permitting the forfeiture of attorney fees. We think, that is, that these governmental interests cannot override an accused's right legitimately (i.e., without sham or fraud) to use his property, even that ultimately proven to be tainted by criminal conduct, to employ private counsel to defend him against criminal charges.

The primary right to counsel of choice must certainly, in this context, encompass that much. If it does not, it is hard to see why government might not do directly what unlimited freeze orders and the threat of forfeiture may obviously do indirectly: simply deny persons accused of certain crimes (or all crimes?) the right to employ private counsel to assist them so long as the back-up right to appointed counsel remains. This would effectively cut off the primary component of the basic sixth amendment right to counsel as we have defined it, and would obviously be unconstitutional if we have correctly analyzed the primary right. If the constitution forbids such a direct denial, it equally forbids an indirect one.

We come to the same conclusion by a process of balancing the individual interests here at stake against these asserted governmental interests. See Sampley, 786 F.2d at 613 (limit of the right to counsel of choice is "found in the countervailing [government] interest"). The right to counsel—whether privately retained or publicly appointed—was obviously created for protection of the guilty as well as the innocent. It must certainly have been created, therefore, on the assumption—indeed with the sure knowledge—that in exercising the primary right to privately retained counsel, ill-gotten gains might be used by defendants who would ultimately be found guilty. Certainly this is a traditional working assumption within the legal profession and one so firmly grounded that it may well explain the incredulity of some district judges and the

organized bar that Congress could possibly have intended effectively to undercut it.

Another individual interest at stake is the interest in having effectively armed private counsel, which means at the very minimum counsel sufficiently informed to mount an effective defense or otherwise provide effective assistance. This necessary assumption of the adversarial system—hence, we must believe, of the authors of the sixth amendment—is also effectively undercut—practically emasculated—by provisions of the Act which make counsel's very ability to retain legitimately contracted fees dependent upon his not being fully informed. This, it must be emphasized, goes not to the right to effective assistance of counsel, but to the primary right to representation by privately retained counsel of choice.

We do not believe that these powerful, constitutionally secured individual interests—grounded in root assumptions of our adversarial system—are outweighed in the constitutional balance by the asserted governmental interests in deterrence, in preserving property for forfeiture, and in depriving convicted persons of their economic bases for further criminal activity. We are therefore satisfied that applications of the Act which effectively deprive of the ability to retain private counsel on any basis other than sham and fraud participated in by counsel involves arbitrary action by government against which the sixth amendment provides protection. Put another way, within established doctrine, we think such applications necessarily deprive accused persons of the fair opportunity guaranteed by the sixth amendment to retain private counsel of choice.

The government's attempts to avoid this constitutional challenge do not persuade us, but their implications are instructive, for they tend to confirm our analysis. The primary governmental contention, rather uncertainly advanced, seems to be that the only constitutional protection against governmental action that effectively cuts off the

ability of an accused to retain private counsel is that provided by the basic sixth amendment right to some counsel, and the further right to the effective assistance of that counsel.

According to this view, there is in this context no primary right to counsel of choice, but only a right to private counsel of choice or appointed counsel at the government's election. Beyond this, there is only a right to the effective assistance of whatever counsel is permitted by government, a right that can only be asserted after conviction and then only by testing that counsel's efforts against the minimal standards of competence and demonstrable prejudice described, e.g., in *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 2064-67, 80 L.Ed.2d 674 (1984).

In this way, the entire question of prejudice resulting from cutting off access to private counsel is mooted by the appointment of public counsel, and the sole question remaining is whether that counsel performed up to minimal standards, rather than the more appropriate but now unanswerable question of whether he performed as competently as would have private counsel of choice. We cannot believe that such a result is contemplated by the sixth amendment's guarantee of the right to counsel.

Attempting to denigrate the essential nature of the primary right to counsel of choice, the government points to various ways in which, without any possible constitutional violation, an accused may find himself unable to exercise that right: unwillingness of counsel to accept representation; disqualification or voluntary withdrawal of counsel; justified refusals to continue cases scheduled for trial; in rem forfeitures and jeopardy tax assessments. These examples certainly illustrate that the right is not absolute, but none has all the distinctive aspects of the in personam forfeitures and associated freeze orders here in issue.

Refusal of particular counsel to accept representation or the withdrawal of retained counsel do not involve governmental action and, along with disqualification, leave open the possibility of further choice; freeze orders or the threat of forfeiture may cut off all ability to choose. Refusals to continue scheduled cases are only justified where the defendant is effectively to blame for failing to exercise the right of choice; forfeiture is authorized under the Act notwithstanding diligent efforts by an accused to retain counsel.

In rem forfeitures and jeopardy tax assessments, which the government contends have never been thought to violate sixth amendment rights though they too might force indigency, concededly provide close parallels. But we think that the parallels are not perfect, and in any event, we are not prepared to say and need not say here, that under no circumstances might these too violate this constitutional right. The government cites the most common example of sequestrations of contraband (the bank robber's loot) as a parallel; but of course it is not. In such cases, the government seizes property manifestly that of someone other than the accused and for preservative purposes. Forfeiture under the Act may obviously reach property of the accused to which no third party has a superior claim. The financial plight that may result to an accused from sequestration of contraband is simply of a piece with that resulting from other vagaries of life that may make it impossible to hire private counsel.

Jeopardy tax assessments, arguably upheld by at least one court against a comparable sixth amendment challenge, see United States v. Brodson, 241 F.2d 107 (7th Cir.1957) (en banc), provide the closest parallel. We think that these too are distinguishable from forfeitures and freeze orders under the Act. But to the extent they may not be, we need not decide here whether they too might under some circumstances implicate the right to counsel of choice. The critical distinction, if one be needed, is that

the jeopardy assessment has as its purpose the preservation of property already owed and wrongfully withheld from the government. In that situation, it might well be that the governmental interest in preservation of the property is more powerful than those asserted in justification of "relation-back" forfeitures of property to which the government had no claim that pre-existed the criminal conduct charged.

Finally, the government suggests that any indigency caused by freeze orders or the threat of forfeiture under the Act is not attributable to government action, but to conduct of the accused sufficiently questionable to produce grand jury or judicial determinations of probable cause. This borders on sophistry, given the obvious point that the sixth amendment guarantee applies equally to the guilty and the innocent. See Badalamenti, 614 F.Supp. at 198.

In sum, we hold that to the extent the Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice. Cf. United States v. Thier, 801 F.2d 1463, 1477 (5th Cir.1986) (Rubin, J., concurring specially) (Act violates substantive due process where all assets frozen). Because prejudice is presumed from the denial of counsel of choice, see United States v. Rankin, 779 F.2d 956, 960 (3d Cir.1986); Wilson v. Mintzes, 761 F.2d 275, 285 (6th Cir.1985); United States v. Burton, 584 F.2d 485, 491 n. 19 (D.C. Cir.1978), 10 a

violation of this right occurs and is remediable as soon as governmental action either directly effects or immediately threatens the unconstitutional result. Cf. Barona Group v. Duffy, 694 F.2d 1185 (9th Cir.1982) (threat of enforcement of ordinance creates justiciable constitutional case).

There remains the issue of how, within the Act's otherwise constitutional application, this sixth amendment light to retain private counsel of choice may be asserted and enforced. This requires some further analysis of the limits of the right and the practical protection due and available to protect it.

Viewed practically, the right as asserted in the context of these cases is only to retain sufficient property, free from government interference, with which to be able to pay legitimate, i.e. reasonable, attorney fees for assisting in a defense to the underlying charges. This means that to the extent an accused has sufficient property not subject to the forfeiture ultimately sought (as that will necessarily be identified by an indictment or a pre-indictment freeze order motion under § 853(e)(1)) his right to counsel of choice is not implicated by any governmental action authorized by or potentially available under the Act. On the other hand, to the extent there is not sufficient untainted property available for that purpose, protection of the use

that immediate appeal would not lie whether or not prejudice was presumed. 465 U.S. at 269, 104 S.Ct. at 1057. While direct decision on this question was avoided by the Court, the stronger implication from its discussion of the alternative possibilities is that prejudice is presumed where counsel of choice is denied. See Rankin, 779 F.2d at 960 (so reading Flanagan).

There is, of course, no corresponding question of the appealability of the orders in Bassett and Reckmeyer. Both are government appeals from adverse injunctive orders entered in connection with the ancillary forfeiture provisions in the RICO and CCE statutes. Different rules of appealability apply to these as a matter of congressional policy, notwithstanding they may have some of the same untoward consequences as would interlocutory appeals by defendants.

<sup>&</sup>lt;sup>10</sup> Flanagan v. United States, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984), is not, as the government suggests, to the contrary. In holding that a criminal defendant cannot take an interlocutory appeal from an order disqualifying his counsel, the Flanagan Court simply applied the strong policy against allowing piecemeal review in criminal cases. It did not hold that this was because denial of the right to counsel of choice was not presumptively prejudicial, and indeed held

of "tainted" resources cannot be limited constitutionally by the requirement that the attorney be a "bona fide purchaser" within contemplation of § 1963(m)(6)(B); but only by the requirement that the contracted or completed transfer of property as attorney fees shall have been legitimate, i.e., not based upon a sham or fraudulent transaction.

In terms of practical enforcement of the right within the Act's framework, this leads to the following. Adequate protection of the right to retain private counsel against the mere threat of forfeiture now exists by virtue of our holding that legitimate attorney fees are constitutionally protected from forfeiture. Since the "bona fide purchaser" requirement may not be applied to defense counsel seeking to protect legitimately paid attorney fees, private attorneys may undertake representation, accepting legitimate fees, without fear of suffering relation-back forfeiture of those fees. With this decision, there is thus no longer any practical necessity for anticipatory pre-conviction motions by either counsel or defendants seeking exemption of particular property from potential freeze orders or forfeiture. They need only contract for and accept legitimate fees.

Where freeze orders are sought by the government, either before or after indictment, enforcement of the right may require judicial determination of two disputable factual issues. The first is whether the defendant has sufficient resources not sought to be frozen with which to employ private counsel. If she does, there is no constitutional impediment to issuing the freeze order as requested. If the defendant does not have sufficient untainted resources, there is only the question whether "tainted" property proposed to be transferred as attorney fees is to any extent based upon a sham or fraudulent transaction as opposed to being within the range of reasonable, hence legitimate, attorney fees. Only to the extent the proposed transfer is found fraudulent—not legitimate—is any freeze order affecting such property constitutionally permissible.

See Thier, 801 F.2d at 1475-77 (Rubin, J., concurring specially).

As to these potential factual issues, we believe that both the burden to show the availability of adequate untainted resources and the burden alternatively to show that a proposed transfer of tainted property is to any extent based upon sham or fraud should be upon the government. See id. at 1476-77 (burden to show availability of sufficient untainted resources should be upon government). It is the government which seeks this extraordinary remedy and which has identified the property it considers forfeitable. It should therefore bear the burden of proof on the dispositive issues. The order of proof as well as the means of proving sham or fraud and the reasonableness of attorney fees under the circumstances of particular cases must of course be left to the district courts.

B.

The defendant in *Harvey*, as indicated, has raised a separate constitutional challenge to the Act's authorization in § 853(e)(1)(A) of ex parte post-indictment restraining orders without any requirement of a post-restraint hearing. Such a restraining order was issued in his case and he contends that this deprivation of his property without such a hearing violated his fifth amendment right to procedural due process.

The government contends that the indictment, based upon a finding of probable cause to believe that the property was forfeitable, supplied all the process due, or that, alternatively, the criminal trial itself, though it did not follow immediately upon the restraining order, supplied adequate post-deprivation process.

We agree with the defendant and with those other courts that have held that neither the indictment itself nor a criminal trial held, as here, three months after issuance of an ex parte restraining order affords the procedural due process guaranteed by the fifth amendment. See United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir.1985); United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir.1985); see also United States v. Long, 654 F.2d 911, 915 (3d Cir.1981) (government cannot rely on indictment alone to show entitlement to a pre-conviction restraining order).

Due process requires that a person not be deprived of his property without notice and opportunity for a hearing. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Where governmental interests permit seizure before notice and hearing, they must be provided within a meaningful time thereafter. Crozier, 777 F.2d at 1383-84. The exact process due is determined by balancing "the risk of an erroneous deprivation, the state's interest in providing specific procedures and the strength of the individual's interest." Crozier, 777 F.2d at 1383; see Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43, 105 S.Ct. 1487, 1493-94, 84 L.Ed.2d 494 (1985).

Post-indictment restraining orders of the kind authorized by the Act and as actually entered in Harvey's case obviously may work a tremendous hardship on accused persons. Stripped of all or major portions of his financial resources, an accused (unless in detention) may be unable pending and throughout trial to provide for the basic necessities of life and whether or not in detention, to provide for the preparation of his legal defense. The defendant's interest is obviously a powerful one, and the risk of an erroneous deprivation substantial. On the other hand the government's interest in providing a particular form of procedure is certainly no different after indictment than in the pre-indictment setting. No reason appears why the government would be unduly burdened or any public interest disserved by providing the same sort of immediate post-deprivation hearing in the post-indictment setting as is required in the pre-indictment setting by § 853 or as is contemplated by Fed.R.Civ.P. 65.

The indictment itself obviously does not afford the type adversary hearing required by due process, though it may suffice as adequate notice and as a sufficient justification for entering the restraining order ex parte. See Thier, 801 F.2d at 1469. Neither does a criminal trial held, as here, as much as three months after the ex parte order, provide a hearing within a meaningful time.

We therefore hold that to the extent the Act authorizes the issuance of ex parte restraining orders after indictment without any post-deprivation hearing other than a criminal trial, it violates fifth amendment due process guarantees, and that as applied specially in Harvey's case, it violated his fifth amendment rights to procedural due process.

V

It remains to apply the above conclusions, including those of constitutional violation, to dispose of the three cases before us.

A.

Bassett, No. 86-5069.

The order from which the government appeals in this case is one entered upon the pre-trial motion of defendants to exempt property sufficient to pay their legal fees from forfeiture, made in response to the Government's notification that it would seek forfeiture of those fees upon defendants' convictions. As noted above, the district court granted the motion on the basis that forfeiture of attorney fees was not intended under the Act in the absence of sham or fraud; and on a finding that there was no sham or fraud associated with the payment of the fees in question.

We have held that property forfeitable under the Act's provisions which has been contracted for or paid as attorney fees may constitutionally be forfeited or restrained from transfer only when and to the extent the fee transaction was a sham or fraudulent one. Here, though on a different basis, the district court has made findings, not challenged, that the fee transaction with appellees' counsel was not infected by sham or fraud.

Accordingly, though on the constitutional ground adopted in this opinion, rather than the district court's statutory interpretation ground, we affirm the district court's order exempting legitimate counsel fees from restraining orders and forfeiture. This must, however, be without prejudice to the Government's right to seek forfeiture, following conviction, of any portion of the aggregate of fees paid which are not legitimate in the sense here discussed.

B

U.S. v. Caplin & Drysdale (Reckmeyer), No. 86-5050.

The order from which the government appeals in this case is one entered upon the third-party claim of defendant Reckmeyer's counsel.<sup>11</sup> following Reckmeyer's conviction

Furthermore, we reject any suggestion that by continuing their rep-

by guilty plea, seeking exemption under § 413(n) of the CCE Act, of legal fees paid to counsel and, in part, held in escrow pending the conviction. As indicated above, the district court granted exemption on the basis, as in *Bassett*, that the Act did not contemplate forfeiture of legitimate attorney fees, the legitimacy of those in issue not having been questioned.

Here, as in Bassett, we affirm, though on constitutional rather than statutory grounds. 12

C.

Harvey, No. 86-5025.

In this appeal, Harvey seeks to challenge his conviction on the grounds that the *ex parte* post-indictment restraining order both violated his sixth amendment right to counsel of choice and to the effective assistance of counsel, and his fifth amendment right to procedural due process.

resentation, counsel effectively mooted or waived derivatively any claim of denial of counsel of choice. Under the circumstances, counsel resolved an ethical dilemma by remaining in the case at considerable financial risk, in order, among other things, to challenge the forfeiture provisions. We will not hold that this resolution made the constitutional claim, timely raised, no longer justiciable.

<sup>11</sup> Counsel's standing to raise the constitutional issues by this m/eans [sic] has been obliquely questioned by the government, both in the district court and on these appeals. We have considered the matter and conclude that standing clearly exists in counsel to raise the counsel of choice issue derivatively. There are of course prudential concerns about standing to assert constitutional rights derivatively, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 2971, 86 L.Ed.2d 628 (1985), but they are not present here. There has been a preexisting relationship between counsel as litigant and their client as possessor of the right that insures effective derivative presentation of the constitutional claim, see Singleton v. Wulff, 428 U.S. 106, 114-15, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d 826 (1976); failure to adjudicate the constitutional rights derivatively asserted would dilute or adversely affect those rights, see Craig v. Boren, 429 U.S. 190, 196, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976); and the rights of the litigant and the possessor of the right are obviously intimately connected and bound together, see id.

Theoretically, under our constitutional holding, the government might have avoided exemption by proving, as an alternative to sham or fraud in the fee transaction, that *Reckmeyer* had available sufficient untainted resources so that the forfeiture of those resources identified in the restraining order and indictment could not have violated his right to counsel of choice (laying aside the separate point that here his counsel of choice remained in the case). That being so, it might be thought that the government should yet have the right, in view of this decision's later advent, to make such a showing if it can. This would of course require a remand opening the district court's order, rather than an outright affirmance. In view of the breadth of the forfeiture, however, we believe that this would be an empty formality, and decline, in the interests of finality, to remand for such a purpose.

(1)

As to the sixth amendment challenge on ineffective assistance grounds, we hold, in line with our traditional approach, that it is not properly made on this direct appeal, but may properly be made only in a collateral proceeding under 28 U.S.C. § 2255. United States v. Fisher, 477 F.2d 300, 302 (4th Cir.1973). This case is quintessentially one in which the record of trial court proceedings does not adequately develop the facts necessary to consider whether the restraining order here challenged actually resulted in ineffective assistance of counsel and, if so, whether actual prejudice occurred under the test of Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

The attempted challenge on denial of counsel of choice grounds presents a more difficult problem. Under our decision today, the restraining order entered here, being based on no finding of sham or fraud in respect of the attorney fees it affected, may technically have violated Harvey's sixth amendment right to counsel of choice. But there is the great complexity here that his counsel of choice was kept in the case-though in somewhat altered identity and reduced numbers—by the device of appointment. From this, the government argues that any technical violation of the right to unfettered choice of particular counsel in particular numbers is demonstrably harmless beyond a reasonable doubt where as here, substantial identity and numbers are preserved by the appointment device. To this, Harvey responds, that, as we have now held, denial of counsel of choice is one of those constitutional errors that is per se prejudicial, i.e., not subject to harmless error excuse. On this basis, he says, he is entitled to immediate reversal of his conviction for the constitutional violation that manifestly occurred.

Without doing violence to the constitutional principle on which our decision is based, we need nevertheless to deal realistically and practically with the narrowly specific problem that was raised in this case but will not recur in light of our decision today. It will not recur because indigency requiring appointment of counsel can no longer be forced by restraining orders or the threat of forfeiture of legitimate attorney fees. While it did occur here, the appointment of substantially the same counsel that had been privately retained makes any constitutional violation of this particular right in this case at least arguable. Where substantially the same counsel has been substituted, the more serious question is whether the reduced fees and support resources that resulted may have resulted in significantly reduced effectiveness of counsel. This, we conclude, can fully and properly be considered only in connection with any collateral claim of ineffective assistance of counsel that may be made under 28 U.S.C. § 2255, and to that we relegate the question.

(2)

We have held that the post-indictment ex parte restraining order violated Harvey's procedural due process rights for want of an adequate post-deprivation hearing within a meaningful time.

This, of course, is error that does not go to his conviction, but only to the deprivation of his property without procedural due process. Consequently, reversal of Harvey's conviction is not an appropriate remedy for this error. See United States v. Ray, 731 F.2d 1361, 1366 (9th Cir.1984). Nor, so long as his conviction and the accompanying order of forfeiture stand, would Harvey be entitled to vacation of the restraining order, the error in its entry having been rendered harmless by the later jury determination of forfeitability. See id.; cf. United States v. Crozier, 674 F.2d 1293, 1298 (9th Cir.1982) (comparable error remediable before trial by vacation of restraining order). Whether Harvey might under any present or future circumstances

have a civil remedy for the temporary violation of his procedural due process rights is of course not before us.

#### VI

For the above reasons, we affirm the order exempting attorney fees from forfeiture in No. 86-5069, United States v. Bassett & Meredith, without prejudice to the government's right in further proceedings to seek forfeiture of any other property or funds transferred as attorney fees in sham or fraudulent transactions; we affirm the order exempting attorney fees from forfeiture in No. 86-5050, United States v. Caplin & Drysdale (Reckmeyer); and we affirm the conviction in No. 86-5025, United States v. Harvey, without prejudice to the right of the defendant to challenge the conviction in collateral proceedings under 28 U.S.C. § 2255 on the constitutional grounds sought to be asserted on this direct appeal.

SO ORDERED.

#### APPENDIX C

# UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA

Crim. No. 85-00010-A

UNITED STATES OF AMERICA v.

CHRISTOPHER F. RECKMEYER, II, et al.

March 27, 1986.

## MEMORANDUM OPINION

CACHERIS, District Judge.

This matter is before the court on the Petition of the law firm of Caplin & Drysdale Chartered ("Caplin & Drysdale") who seek a modification of the forfeiture order entered by the court on May 17, 1985, to permit payment of defendant Christopher Reckmeyer's attorneys' fees. This case presents a conflict between the forfeiture of drug related assets under the Comprehensive Forfeiture Act of 1984 and a defendant's right to counsel under the Sixth Amendment to the Constitution. For the reasons set forth below, the Petition is granted.

I

The basic facts are not in dispute.

The law firm of Caplin & Drysdale began representing Christopher Reckmeyer in the summer of 1983, in connection with a grand jury investigation of drug trafficking activities in the Eastern District of Virginia which culminated in an indictment issued against Reckmeyer and twenty-five other individuals on January 15, 1985. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale \$26,444.97 for services rendered and costs incurred through that date.

On January 14, 1985, this court issued an Order pursuant to an ex parte application by the government which restrained the transfer of assets by Reckmeyer and others. On January 25, 1985, Christopher Reckmeyer surrendered. At his request, Caplin & Drysdale continued to represent him in his defense of the indictment. On March 14, 1985, Christopher Reckmeyer plead guilty to Count 2—engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. He also plead guilty to Counts 26 and 31, which charged violations of Federal tax laws.

On March 15, 1985, oral argument was held before Judge Bryan of this court on Reckmeyer's motion filed on March 7, 1985, for an order modifiying the restraining order of January 14, 1985, to exclude attorneys' fees from forfeiture. Judge Bryan denied this motion on March 15, 1985, on the ground that Reckmeyer had plead guilty to Count 2 on the previous day. Judge Bryan stated, however, that Caplin & Drysdale could, on its own behalf, raise the issue of forfeitability of attorneys' fees in the context of a third-party petition.

On May 17, 1985, Reckmeyer was sentenced to a period of incarceration, and a Forfeiture Order was entered listing virtually all assets possessed by Reckmeyer, including real estate, gems and \$200,000 in United States currency. The Forfeiture Order specifically included:

29. All monies and funds restrained by January 14, 1985, restraining order entered in the above styled case, including but not limited to the approximately \$25,000 held in escrow by Bernard S. Bailor [a mem-

ber of the law firm of Caplin & Drysdale] and/or his agents.

Forfeiture Order dated 5/17/85.

In defending the charges against Reckmeyer, Caplin & Drysdale incurred the following expenses and time charges:

a. Disbursement for the retention of Stanley J. Reed of Lerch, Early, Roseman & Frankel to assist in Reckmeyer's defense. Mr. Reed was retained in order to comply with the requirements of Canon 6, ABA Code of Professional Responsibility because Caplin & Drysdale was not experienced in defense of drug cases. (Exhibit G.)

\$ 46,975.54

b. Other disbursement in connection with the defense (duplicating, telephone, investigators, etc.) (Exhibit H).

\$ 14,313.95

c. Caplin & Drysdale attorney time charges. (Exhibit H).

\$109,223.50

Total Expenses

\$170,512.99

In rendering these services to Reckmeyer, Caplin & Drysdale was a good faith provider of services for value. Caplin & Drysdale has not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets. Pursuant to 21 U.S.C. § 853(n)(2), Caplin & Drysdale filed its Petition to the court for a hearing to adjudicate the validity of their interest in the forfeited assets.

II

Caplin & Drysdale argues that the forfeiture statute was not intended to reach legitimate attorney's fees, and therefore they are entitled to be paid the fees and costs incurred in representing Christopher Reckmeyer. They further argue that any construction of the forfeiture statute which reaches legitimate attorney's fees would violate a criminal defendant's Sixth Amendment Right to Counsel. The government argues that the attorneys only have standing to contest the forfeiture of \$25,444.97 actually delivered to them by Reckmeyer but do not have standing to contest the balance owed by Reckmeyer. They further argue that the forfeiture statute can be plainly read to encompass attorney's fees and that the court should not order the government to pay the defendant's attorney of choice out of funds which rightly belong to the government under the relation-back principle of Section 853(c).

## a. Standing

Under the Forfeiture Act, the disposition of third-party claims is governed by 21 U.S.C. § 853(n)(6). This section provides:

- (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—
  - (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
  - (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

The government argues that petitioners do not have standing to contest the Order of Forfeiture under Section 853(n)(6). The government position is that petitioners cannot claim either a superior right, title or interest "at the time of the commission of the acts which gave rise to the forfeiture," 21 U.S.C. § 853(n)(6)(A), or that they are "bona fide purchaser[s] for value" who were "reasonably without cause to believe that the property was subject to forfeiture," 21 U.S.C. § 853(n)(6)(B).

The legislative history of the criminal forfeiture statute provides: "Third parties who assert claims to criminally forfeited property, which in essence are challenges to the validity of the order of forfeiture, are entitled to a judicial determination of their claim." S.Rep. No. 225, 98th Cong., 1st Sess. 208 (1983), U.S.Code Cong. & Admin. News 1984. pp. 3182, 3391. It is clear from the Senate Report that petitioners' claims fall within the scope of persons which Congress recognized as being "entitled to a judicial determination of their claim," even though they cannot specifically make a claim for relief under Section 853(n)(6). The court having found petitioners to be a good faith provider of services, it follows that they have a legal interest in the property forfeited. Their status is, at least, equal to that of a general creditor, and therefore the court finds that they do have standing to present their claims.1

This ruling is consistent with the court's ruling on the Petition of William Reckmeyer in which it held that Section 853(n)(6)(A) provided standing for all general creditors to make claims which may rebut the government's presumption of forfeitability under Section 853(d). See Memorandum Opinion dated February 5, 1986, at 13. The only difference here, is that the petitioners are challenging the reach of the entire forfeiture statute as it applies to attorney's fees and not the forfeitability of property under a particular section of the statute. The court would also further note that counsel in its representation of William Reckmeyer did raise this issue before Judge Bryan of this court in the

## b. Sixth Amendment

The court having found that the petitioners have standing, the question before the court is whether counsel fees and costs are exempt from forfeiture under the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853.

Four other district courts have addressed this issue, albeit in a pretrial context. In United States v. Rogers, 602 F.Supp. 1332 (D.Col.1985), the government filed a petition for an order restraining transfer of property by defendants under an indictment alleging forfeiture under the Comprehensive Forfeiture Act of 1984. The court held that attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions. In In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F.Supp. 839 (S.D.N.Y.1985), the court refused to quash a government subpoena seeking information regarding defense counsel's fee arrangement with defendant in order to obtain information regarding potentially forfeitable assets. In addressing the question of forfeitability, the court, specifically declining to follow Rogers, held that the government is entitled to a preliminary order restraining attorney's fees under the Comprehensive Forfeiture Act. In United States v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y.1985), the court, in ruling on a defendant's motion to quash a trial subpoena duces tecum served upon defense counsel, held that the government may not seek a special verdict as to the forfeiture of attorney's fees under 18 U.S.C. § 1963 or 21 U.S.C. § 853 and may not rely on forfeiture in support of the subpoena at issue.

form of a motion for modification of the ex parte protective order obtained by the government. At that time, Judge Bryan told counsel they could present their claims in the form of a third-party petition under Section 853(n). In light of these facts, the court thinks it would be unfair to not give petitioners standing at this time to hear their claims.

Finally, in *United States v. Ianniello*, 85 Cr. 115 (S.D.N.Y. Sept. 3, 1985) (slip op.) the defendants sought and obtained an order declaring that attorneys' fees are exempt from forfeiture under 18 U.S.C. § 1963.<sup>2</sup>

This court agrees with the reasoning of the Rogers, Badalamenti, and Ianniello courts, and does not believe that Congress intended that the Comprehensive Forfeiture Act of 1984 would encompass bona fide legal fees paid to a criminal defendant's attorney. Such an application of the Act would in all likelihood violate the Sixth Amendment while not furthering any Congressionally desired ends of the statute. Absent some clear indication in the statute or legislative history that Congress did address this issue, it seems inconceivable that they intended the Forfeiture Act to be applied in this manner.

As the court noted in *Badalamenti*, a literal reading of Section 853 would seem to encompass legal fees. Section 853(a) provides that any person convicted of a violation of the federal drug laws shall forfeit "any property" which constitutes a proceed or was used to facilitate the criminal activity or, in the case of a person engaging in a continuing criminal enterprise, "any of his interest in, claims against, and property or contractual rights affording a source of control over" the enterprise. 21 U.S.C. § 853(a) (emphasis supplied). The statute does not specifically exempt counsel fees. The legislative history of the statute does, however, touch on this issue. The House Judiciary Committee Report states:

Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore does not resolve the conflict in

<sup>&</sup>lt;sup>2</sup> 18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853.

District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case.

H.R.Rep. No. 845, pt. 1 98th Cong., 2nd Sess. 19 n. 1 (1984). This passage, appears to modify the broad language in the statute so that it will not be read as a Congressional affirmation that forfeiture of attorney's fees is constitutionally permissible. It appears that Congress did not intend to take a position regarding the forfeitability of attorney's fees through this legislation, but rather decided to leave the resolution of this issue to the courts. In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F.Supp. at 849-50 n. 14. The broad language of the Section 853(a), which speaks in terms of "any property" of the defendant, should not therefore be read as a Congressional statement that attorney's fees in a criminal case are subject to forfeiture under this Act. This court's finding that the forfeiture of attorney's fees violates the Sixth Amendment is therefore not inconsistent with the Congressional intent behind the Comprehensive Forfeiture Act, it appearing that it was Congress' intent all along that the courts would resolve this question.

The application of Section 853 to encompass bona fide attorney's fees would violate a defendant's Sixth Amendment rights in two ways. First, it would violate the defendant's right to obtain counsel of his choice. Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932); United States v. Inmann, 483 F.2d 738 (4th Cir.1973) (Sixth Amendment includes right to reasonable opportunity to obtain, and be represented by an attorney of one's choosing where defendant can do so from his own resources). Second, it would create inherent conflicts of interest between the attorney and his client, and would chill the free flow of information between attorney and client, resulting in a deprivation of the defendant's right to effective assistance of counsel. See Strickland v. Wash-

ington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Ianniello, slip op. at 12-13; United States v. Rogers, 602 F.Supp. at 1349.

It cannot be disputed that the application of the thirdparty forfeiture provisions to attorneys' fees will restrict a defendant's ability to obtain counsel of choice. See Justice Department Guidelines on Forfeiture of Attorneys' Fees. 38 Crim.L.Rep. (BNA) 3001, 3002 (Oct. 2, 1985). Indeed, the notice provisions of Section 853(n)(6)(B) and the "relation-back" doctrine of Section 853(c), as construed and applied by the government, will deprive a defendant of counsel of choice no less effectively than if the government simply prohibited a defendant from hiring a lawyer. Attorneys will not represent a defendant if they know that, upon his conviction, their fees will be subject to forfeiture or that, as in the instant case, due to a restraining order, they cannot be compensated for legal services rendered prior to and including trial, and are later prohibited from asserting an interest in fees which otherwise would have been paid.

The right to obtain counsel of one's choosing is not absolute, but "must be carefully balanced against the public's interest in the orderly administration of justice." Linton v. Perini, 656 F.2d 207, 209 (6th Cir.1981). See also United States v. Burton, 584 F.2d 485, 488-89 (D.C.Cir.1978) (counsel of choice may only be deprived where compelling need to assure prompt effective and efficient administration of justice); United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir.1983) (prosecution must show important interest adversly affected by permitting chosen counsel to proceed).

In this court's opinion, there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their "economic bases" upon conviction. See S.Rep. 98-225 at 191; see also Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). The relation-back provision of Section 853(c) authorizes the court to set aside illusory or fraudulent transfers so that a defendant cannot, prior to conviction, avoid forfeiture by transferring assets to a nominee. See S.Rep. 98-225 at 209 n. 47. Exempting legitimate attorney's fees from forfeiture would not undermine these purposes because "[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham." United States v. Rogers, 602 F.Supp. at 1348, and therefore a defendant who is found guilty will still be separated completely from his economic base.

Subjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice. The forfeiture of attorney's fees would likely cause chosen counsel to withdraw, leading to delays, disruption of the criminal proceeding, and further creating serious problems for already overburdened public defenders. It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since that Act places limits on the amount which can be paid as attorney's fees. Finally, subjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO

or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is "on notice." Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable. See United States v. Rogers, supra, 602 F.Supp. at 1350 (application of forfeiture provisions to attorney's fees violates due process because: "The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries"). Ultimately, therefore, forfeiture of attorney's fees would undermine the adversary system itself, by producing an imbalance of powers that would violate the due process clause of the Fifth Amendment. See Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973) (due process requires "balance of forces between the accused and his accuser"); Gandy v. Alabama, 569 F.2d 1318, 1321 (5th Cir.1978) (defendant's due process protection includes "fair opportunity to be represented by counsel of his own choice").

As the court stated in *Badalamenti*, the denial of choice of counsel is only the beginning of the problems that the government's position would raise. The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. *See Strickland v. Washington*, 104 S.Ct. 2052 (1984); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir.) cert. denied 451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981).

Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity; the attorney's obligation to

The availability of court-appointed counsel under the CJA is also inadequate because, due to threat of forfeiture of attorney's fees, individuals would be deprived of the opportunity to obtain any legal representation before they are officially charged or rendered "financially unable" to hire their own counsel. Thus, during the pendency of a grand jury investigation, a defendant, who is not only presumed innocent but has not even been charged with a crime, could not obtain the advice of counsel on such matters as whether to assert his Fifth Amendment rights.

negotiate a guilty plea which is in his client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture; the attorney's desire to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture" would conflict with his obligation to maintain his client's confidences. *United States v. Badalamenti*, 614 F.Supp. 194, 196-197 (S.D.N.Y.1985).

The possibility of an attorney appearing as a third-party petitioner in a Section 853(n) hearing also undermines the attorney-client relationship, further impinging on the right to counsel. The threat of an attorney having to disclose information obtained from his client will chill the openness of attorney-client communications. *Rogers*, 602 F.Supp. at 1349. If an attorney advised his client of the possible ramifications of the disclosure of this information to him, the free flow of information would be even further chilled depriving the defendant of effective representation. *Ianniello*, slip op. at 12-13.

In summary, the court finds that the Comprehensive Forfeiture Act does not encompass the forfeiture of bona fide attorney's fees of the defendant. Such a construction of the statute would not violate the Sixth Amendment, and is not contrary to the legislative intent of Congress. Having already found that Caplin & Drysdale was a good faith provider of services for a value of \$170,512.99, the court will direct the government to pay Caplin & Drysdale \$170,512.99 out of the forfeited assets of Christopher Reckmeyer.

An appropriate Order will issue.

## APPENDIX D

Title 21, Chapter 13, Drug Abuse Prevention and Control

# § 853. Criminal Forfeitures

Property subject to criminal forfeiture

- (a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—
  - (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
  - (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
  - (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

# Meaning of term "property"

(b) Property subject to criminal forfeiture under this section includes—

- (1) real property, including things growing on, affixed to, and found in land; and
- (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

## Third party transfers

(c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

# Rebuttable presumption

- (d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—
  - (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
  - (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

## Protective orders

- (e) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—
  - (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
  - (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—
    - (i) there is a substantial probability that the United States will prevail on the issue of for-feiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
    - (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

- (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.
- (3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

## Warrant of seizure

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

## Execution

(g) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

# Disposition of property

(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

# Authority of the Attorney General

- (i) With respect to property ordered forfeited under this section, the Attorney General is authorized to-
  - (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;
  - (2) compromise claims arising under this section;
  - (3) award compensation to persons providing information resulting in a forfeiture under this section;
  - (4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and
  - (5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

# Applicability of civil forfeiture provisions

(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

## Bar on intervention

(k) Except as provided in subsection (n) of this section, no party claiming an interest in property subject to for-feiture under this section may—

- (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this subchapter; or
- (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

### Jurisdiction to enter orders

(l) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

## **Depositions**

(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

# Third party interests

(n) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

- (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
- (3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.
- (4) The hearing on the petition shall, to the extent practicable and consistent with the interest of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.
- (5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and

evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

- (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—
  - (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
  - (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

#### Construction

(o) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

# Forfeiture of substitute property

- (p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—
  - (1) cannot be located upon the exercise of due diligence;
  - (2) has been transferred or sold to, or deposited with, a third party;
  - (3) has been placed beyond the jurisdiction of the court;
  - (4) has been substantially diminished in value; or
  - (5) has been commingled with other property which can not be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

## APPENDIX E

## CONSTITUTION OF THE UNITED STATES

#### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, expect in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(3)

BURENE COURT, U.S.
BILLED
JUN 9 1988
UOSEPH E. SPANIOL, JR.
CLERK

No. 87-1729

# In the Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

ν.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

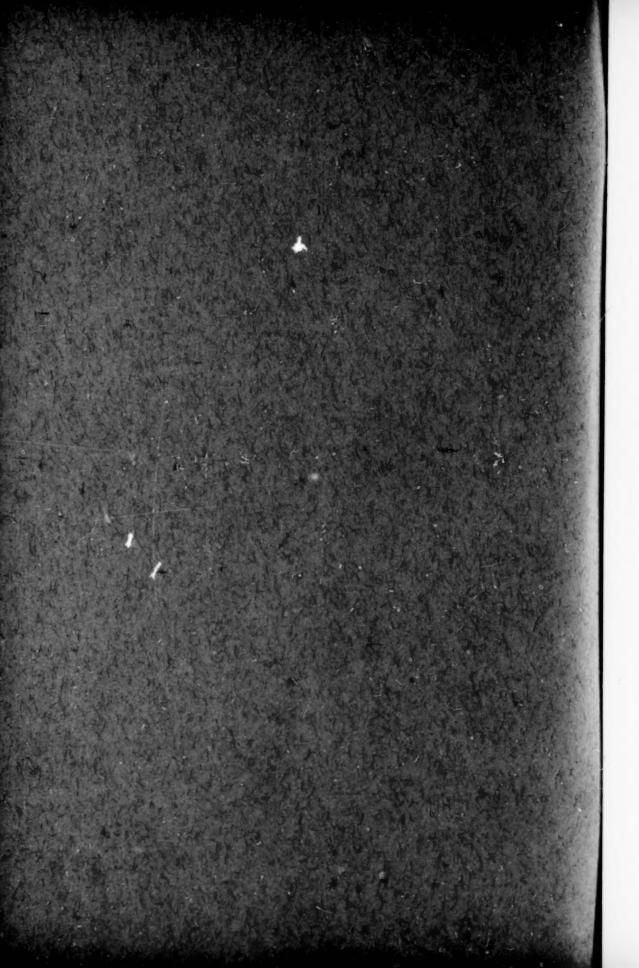
#### **BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTIONS PRESENTED**

1. Whether assets that are otherwise subject to forfeiture under 21 U.S.C. (Supp. IV) 853 because they are the proceeds of or are connected to the defendant's participation in a continuing criminal enterprise under the federal drug laws are exempt from forfeiture where the defendant wishes to use the assets to pay defense counsel.

2. Whether, if such assets are not exempt from forfeiture, the statutory provisions requiring the forfeiture of the assets are unconstitutional under the Sixth Amendment because they may have the effect of rendering the defendant unable to retain counsel of his choice.

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### **BRIEF FOR THE UNITED STATES IN OPPOSITION**

#### **OPINIONS BELOW**

The opinion of the court of appeals en banc (Pet. App. 1a-29a) is reported at 837 F.2d 637. The opinion of the panel of the court of appeals (Pet. App. 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (Pet. App. 81a-92a) is reported at 631 F. Supp. 1191.

#### **JURISDICTION**

The judgment of the en banc court of appeals was entered on January 11, 1988. On February 26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988 (a Monday), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. On January 15, 1985, Christopher F. Reckmeyer, II, was charged in an indictment in the Eastern District of Virginia with heading a massive drug operation. One count of the indictment charged Reckmeyer with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. (Supp. IV) 848. The indictment also sought forfeiture under 21 U.S.C. (Supp. IV) 853 of certain specified assets and any other assets in which Reckmeyer had an interest arising from his participation in the criminal enterprise. Pet. App. 4a, 31a. Section 853(a) provides that a person who is convicted of violating the CCE statute shall forfeit to the United States any property consisting of proceeds of the violation, any property used in the commission of the offense, and any interest in, claims against, or property or contractual rights affording him a source of influence over the criminal enterprise. 21 U.S.C. (Supp. IV) 853(a). Any right in forfeited property "vests in the United States upon the commission of the act giving rise to forfeiture" (21 U.S.C. (Supp. IV) 853(c)). If the district court enters an order of forfeiture under these provisions, a third party may petition the court to amend the order to exclude particular property if he establishes: (A) that he had an interest in the property that was superior to the interest of the defendant at the time the defendant committed the act giving rise to forfeiture, or (B) that he was a bona fide purchaser for value and was reasonably without cause to believe that the property was subject to forfeiture (21 U.S.C. (Supp. IV) 853(n)(6)).

On January 14, 1985, the day before the indictment was returned, the United States obtained an ex parte order restraining the transfer of assets by Reckmeyer. On March 7, 1985, Reckmeyer moved to modify the restraining order

to exclude assets that he wished to use to pay his attorneys, who were affiliated with petitioner, the law firm of Caplin & Drysdale. On March 14, 1985, before the district court ruled on the motion, Reckmeyer pleaded guilty to the CCE count and two tax evasion counts. Pet. App. 82a. Reckmeyer's plea agreement stated that his organization was responsible for the distribution of more than 169 tons of marijuana and ten tons of hashish over the course of 50 ventures. Reckmeyer admitted that he realized millions of dollars from drug transactions, which were his only significant source of income (id. at 4a; see also United States v. Reckmeyer, 786 F.2d 1216 (4th Cir. 1986), cert. denied, No. 86-82 (Oct. 6, 1986)). The plea agreement required Reckmeyer to forfeit 41 assets specifically listed in the indictment, as well as any proceeds from those assets and all other assets that were the proceeds of his drug activities or were directly or indirectly related to those activities (id. at 1217).

On March 15, 1985, the district court denied Reckmeyer's motion to modify the restraining order so that he could use some of the assets to pay attorney's fees to petitioner. The court denied the motion on the ground that Reckmeyer had already pleaded guilty to the CCE count that gave rise to forfeiture. The court entered an order of forfeiture on May 17, 1985, and included in the order virtually all assets possessed by Reckmeyer, including real estate, gems, and \$200,000 in currency (Pet. App. 39a, 82a-83a).

Petitioner then filed a petition under 21 U.S.C. (Supp. IV) 853(n) to amend the order of forfeiture to exclude sufficient property to pay \$170,512.99 in expenses incurred in the representation of petitioner. In an opinion dated

<sup>&</sup>lt;sup>1</sup> The court also sentenced Reckmeyer to a term of 17 years' imprisonment (*United States* v. *Reckmeyer*, 786 F.2d at 1217 n.1).

March 27, 1986, the district court held, as a matter of statutory construction, that attorney's fees are exempt from forfeiture under Section 853 (Pet. App. 81a-92a).<sup>2</sup> The court acknowledged that a literal reading of the statute encompasses assets that might be used to pay legal fees, because it provides for the defendant to forfeit "any property" that is derived from or was used to facilitate the violation and "any of his interest in" the CCE enterprise (21 U.S.C. (Supp. IV) 853(a) (emphasis added)). Pet. App. 87a. But the court concluded that such a construction would violate a defendant's Sixth Amendment right to retain counsel of his choice and would give rise to a conflict of interest because the attorney would have a pecuniary interest in the outcome of the case. Pet. App. 88a-92a. The court therefore ordered the government to pay \$170,512.99 to petitioner out of the assets that Reckmeyer had forfeited to the United States (id. at 92a).

2. A panel of the court of appeals affirmed the district court's order excluding the \$170,512.99 from forfeiture (Pet. App. 30a-80a). The panel first held, contrary to the district court's view, that Section 853 does reach assets marked for or paid to the defendant's attorney (Pet. App. 41a-52a). In the panel's view, the language of the relevant

forfeiture provisions "is so clear and so plainly reaches property legitimately contracted to be paid or paid as attorneys fees as not to permit judicial resort to legislative history" (id. at 42a; see id. at 32a-36a, 43a-44a). The panel further concluded that "even if resort to legislative history were made, examination of that history would reveal no such clear intent to exclude property marked for or paid as attorney fees as would be required to compel such an interpretation, and indeed would tend rather to confirm the contrary intention reflected in the plain statutory language" (id. at 42a; see id. at 45a-52a). In particular, the panel held that passing references in the legislative history to Congress's insistence that defendants not avoid forfeiture by entering into "sham" or "fraudulent" transactions did not confine the broad statutory language to those narrow circumstances. In the panel's view, that interpretation would ignore the carefully drawn exceptions to forfeiture, which are limited to claims by third parties who had an interest in specific property that was superior to that of the defendant or were bona fide purchasers of property without reasonable cause to believe that the property was subject to forfeiture (21 U.S.C. (Supp. IV) 853(n)(6)). Pet. App. 46a-50a.

The panel held, however, that the statutory forfeiture provisions are unconstitutional to the extent that they apply to assets that the defendant used or proposes to use to pay what the court termed "legitimate" attorney's fees (Pet. App. 53a-73a). In the panel's view, the prospect that assets might be subject to a restraining order prior to trial, and to a judgment of forfeiture after conviction, would deter counsel from accepting the case and thereby imper-

<sup>&</sup>lt;sup>2</sup> The district court characterized petitioner as "a good faith provider of services for value" and observed that petitioner "ha[d] not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets" (Pet. App. 83a).

<sup>&</sup>lt;sup>3</sup> For convenience, the panel addressed the issue of statutory construction by analyzing the parallel forfeiture provisions under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. (Supp. IV) 1963, which was involved in another appeal that had been consolidated with this case. As the panel observed, the RICO forfeiture provisions are "virtually identical" to those at issue here, and the panel's reasoning therefore applied equally to both statutory schemes (Pet. App. 33a n.1).

missibly interfere with the defendant's Sixth Amendment right to retain counsel of his choice (id. at 62a-72a).4

3. The full court of appeals granted the government's petition for rehearing en banc and reversed the district court's order excluding from forfeiture the \$170,512.99 that petitioner sought to recover for its representation of Reckmeyer (Pet. App. 1a-29a). As a threshold matter, the en banc court unanimously agreed with the panel that 21 U.S.C. (Supp. IV) 853 does not exempt attorney's fees from forfeiture (Pet. App. 5a-7a; id. at 26a (Phillips, J., dissenting)). In the en banc court's view, the statutory language is "unmistakably clear" and "plainly reaches property used or intended to be used for attorneys' fees" (id. at 5a). The court noted that the statute makes no mention of attorney's fees in the definition of property that is subject to forfeiture (21 U.S.C. (Supp. IV) 853(a) and (b)) or in the exceptions for certain third-party claims (21 U.S.C. (Supp. IV) 853(n)), but rather "exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys" (Pet. App. 6a). The en banc court also agreed with the panel that "the legislative history provides no basis for concluding that attorneys' fees are not subject to forfeiture" (id. at 5a), because the disapproval of "sham" transactions in the legislative history "cannot \* \* \* legitimately be used to restrict statutory language that is unambiguously more broad" and because "limiting forfeiture to assets transferred in sham transactions would read the bona fide purchaser requirement right out of the statute" (id. at 6a).

In contrast to the panel, however, the majority of the en banc court held that application of the forfeiture provisions to assets the defendant wishes to transfer to his attorney does not violate a defendant's Sixth Amendment right to counsel (Pet. App. 8a-22a). The court stressed that the forfeiture requirement "poses no threat whatsoever to the absolute right to be represented by counsel" (id. at 8a), because, if necessary, "the defendant's right to representation will be protected by the appointment of counsel" (id. at 9a; see id. at 8a-10a).

The court also concluded that the forfeiture provisions do not impermissibly interfere with a defendant's right to counsel of his choice (Pet. App. 11a-16a), which is necessarily "limited by the government's interest in the orderly administration of justice" (id. at 11a). It observed that prior decisions concerning the right to counsel of choice had involved situations in which the defendant sought to retain counsel by spending his own assets; under the CCE forfeiture provisions, by contrast, the assets are "an integral part of the very crime with which the defendant is charged" and therefore constitute property "in which the law recognizes no ownership rights of the defendant" (id. at 12a). The court also pointed out that there are "multitudinous circumstances" that might leave a defendant without the attorney he would most prefer: the attorney might not want to represent the defendant or might be concerned that the defendant will not be able to pay, perhaps because a creditor has obtained liens against his property; or the court's schedule or rules requiring the hiring of local counsel might not allow for representation by a particular lawyer (id. at 13a). In the court's view, the

<sup>&</sup>lt;sup>4</sup> The panel concluded that the forfeiture provisions are not unconstitutional as applied in this setting merely because of the possibility that in some circumstances the potential for forfeiture of assets might give rise to a conflict of interest on the part of the attorney or otherwise affect his relationship with the defendant. The panel reasoned that such claims of ineffective assistance of counsel would have to be decided on the basis of the facts in an individual case, if the defendant was convicted. Pet. App. 59a-61a.

operation of the forfeiture provisions to deprive the defendant of any interest in property associated with the continuing criminal enterprise is another event that may have the effect of preventing a defendant from choosing a particular lawyer, without constituting a deprivation of the qualified Sixth Amendment right to counsel of choice. The court thus "decline[d] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (id. at 15a).5

#### ARGUMENT

Petitioner argues that the court of appeals' decision is wrong on both statutory and constitutional grounds. There is, however, no conflict among the circuits on either issue. The ruling by the Fourth Circuit on the constitutional issue is consistent with the decisions of the Second and Tenth Circuits, the only other courts of appeals that have addressed that issue. *United States* v. *Monsanto*, 836 F.2d 74 (1987), petition for reh'g en banc granted, No. 87-1397 (2d Cir. Jan. 29, 1988) (argued en banc Mar. 30, 1988); *United States* v. *Nichols*, 841 F.2d 1485 (10th Cir.

1988). Although a panel of the Fifth Circuit held earlier this year, albeit as a matter of statutory construction, that an attorney has a right to recover his fees out of property the defendant forfeited to the United States, the Fifth Circuit has granted rehearing en banc to reconsider that position. United States v. Jones, 837 F.2d 1332 (1988), petition for reh'g granted, No. 87-5556 (Apr. 27, 1988).7 Even on the statutory issue, then, there is no conflict among the circuits and thus no need for review by this Court. Moreover, this case is not a suitable vehicle for considerating the validity of the forfeiture provisions where they have the effect of depriving a defendant of counsel of his choice, because Christopher Reckmeyer in fact was represented by counsel of his choice - attorneys in the petitioner law firm of Caplin & Drysdale-throughout the proceedings. The petition for a writ of certiorari therefore should be denied.

On the merits, the decision of the court of appeals was correct, for the reasons we set forth in some detail below.

1. The Statutory Issue. As explained by the court of appeals, the CCE forfeiture provisions are broad, because they were designed to deprive the defendant of all the

<sup>&</sup>lt;sup>5</sup> Judges Widener and Murnaghan concurred in the majority's opinion but also filed brief concurring opinions (Pet. App. 22a-23a, 23a-26a). Judges Phillips, Winter, Sprouse and Ervin dissented from the majority's Sixth Amendment ruling, largely for the reasons stated in Judge Phillips' opinion for the panel (id. at 26a-29a).

<sup>6</sup> Contrary to petitioner's contention (Pet. 12), the Second Circuit in Monsanto did not suggest that the forfeiture provisions must be applied in a manner that permits an attorney to recover his fees. In the portion of its opinion upon which petitioner relies, the Second Circuit considered the issues that are raised in the context of a restraining order issued prior to trial, when it has not been definitively determined that the assets are subject to forfeiture. 836 F.2d at 83-84. The issue in this case, by contrast, arises in the post-conviction context, and Reckmeyer's guilty plea, for which he received petitioner's assistance,

conclusively establishes that the assets out of which petitioner now seeks to recover its fees are the proceeds of Reckmeyer's illegal drug activities and therefore were subject to forfeiture.

<sup>&</sup>lt;sup>7</sup> The Fifth Circuit did not consider the question of statutory construction at any length in *Jones*, because it believed, contrary to the government's contention, that this result was required by its prior decision in *United States* v. *Thier*, 801 F.2d 1463 (1986), modified, 809 F.2d 249 (1987) (837 F.2d at 1335, citing 801 F.2d at 1474). Indeed, in a special concurring opinion, Judge Davis stated that he concurred in the majority's opinion because he believed that *Thier* required that result, but that, if free to do so, he would follow the reasoning of the Fourth Circuit in the instant case (837 F.2d at 1336).

fruits of his criminal activities. Pet. App. 19a-20a (quoting S. Rep. 98-225, 98th Cong., 1st Sess. 191 (1983):

In the Comprehensive Forfeiture Act of 1984,[8] Congress recognized that the illegal drug trade poses a grave threat to every part of our society. The trade has spawned violent crime, threatened the integrity of local law enforcement, and condemned countless thousands of young lives to the service of a chemical compulsion. "Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." \* \* The Comprehensive Forfeiture Act represents, above all, Congress' attempt to "strip these offenders and organizations of their economic power," and the recognition that "forfeiture is the mechanism through-which such an attack can be made."

See also Nichols, 841 F.2d at 1487-1488; compare Russello v. United States, 464 U.S. 16, 27-28 (1983). The court of appeals was clearly correct in its holding—concurred in by all judges on the en banc court—that assets that are otherwise subject to forfeiture under the CCE statute are not rendered immune from forfeiture merely because the defendant wishes to use those assets to pay his attorney. Pet. App. 5a-7a, 41a-53a.

a. The statutory text forecloses petitioner's claim of exemption. The CCE statute broadly provides that if a person is convicted of a CCE offense, he shall forfeit to the United States "any property" constituting the proceeds of his violation of the drug laws, "any of the person's property" used in the commission of the violation, and "any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing

8 Pub. L. No. 98-473, 98 Stat. 2040.

criminal enterprise." 21 U.S.C. (Supp. IV) 853(a)(1), (2) and (3) (emphasis added). There is no exception in this sweeping language for property that might be used to pay an attorney. Moreover, the statute explicitly provides that "[a] right, title, and interest in property described in subsection (a) \* \* \* vests in the United States upon the commission of the act giving rise to forfeiture" (21 U.S.C. (Supp. IV) 853(c) (emphasis added)). Accordingly, where, as here, the defendant has already committed such an act, his desire to use some of the property to discharge a debt to this attorney (or anyone else) comes too late: by that time, what previously had been the defendant's interest in the property has already vested in the United States, and the defendant therefore has no right to treat the property as his own and to use it, inter alia, to purchase a house, an automobile, a vacation, or, as here, the services of a lawyer.

If there could be any doubt on this point, it is dispelled by the consequences that the CCE statute prescribes where the defendant does treat forfeited property as his own by transferring it to a third party after he commits the act giving rise to forfeiture. In those circumstances, the property remains subject to forfeiture even in the hands of the third party, "unless the transferee establishes in a hearing pursuant to [Section 853(n)] that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture" (21 U.S.C. (Supp. IV) 853(c)). If the transferee makes such a showing, the defendant is not thereby relieved of liability, since that result would enable him to benefit from his illegal drug activities by using the proceeds to discharge his debts. Accordingly, the CCE statute provides that if property subject to forfeiture has been transferred to a third party, the court shall order the

forfeiture of substitute property of the defendant up to the value of the transferred property. 21 U.S.C. (Supp. IV) 853(p)(2). In short, the forfeiture provisions on their face leave no room for the defendant to use illicit assets that are subject to forfeiture for *any* purpose, including to pay an attorney.

This conclusion is further reinforced by the fact that the CCE statute contains carefully drawn provisions that exempt certain assets from the operation of the forfeiture sanction, but do not provide for exemption of assets that the defendant wishes to pay to his attorney. In fact, there is no statutory exemption at all for the defendant's interests in property that is subject to forfeiture, and there is therefore no mechanism by which he can free up forfeited assets to discharge his debts. Rather, the two statutory exemptions in 21 U.S.C. (Supp. IV) 853(n)(6) protect only the interests of certain third parties. Neither of those exemptions permits petitioner to recover the funds it seeks from Reckmeyer's illicit assets, since neither exemption accords special treatment to a third-party claimant simply because he happens to be an attorney.

Petitioner for the most part seeks to receive fees not out of funds that Reckmeyer had already disbursed, but out of forfeited assets that remained in Reckmeyer's possession until they were seized by the United States. Section 853(n)(6)(A) permits amendment of the forfeiture order as regards such assets only where the third-party claimant establishes that the order of forfeiture is invalid because he had an interest in the property that was superior to that of the defendant at the time the defendant committed the act giving rise to forfeiture—i.e., that the property did not belong to the defendant—and therefore could not be forfeited to the United States. That exemption, which protects mortgagees, other secured creditors, and the like, obviously has no application here. Petitioner does not assert

that it had a security or other legally protected interest in specific property that was superior to the interest of Christopher Reckmeyer at the time Reckmeyer committed the acts that gave rise to the forfeiture. Petitioner's claim for attorney's fees arose later, after petitioner rendered legal services, and even now petitioner does not assert any protected interest in specific property that Reckmeyer forfeited to the United States. Petitioner therefore is merely a general creditor who seeks to draw on property of the United States to recover on a debt owed to it by a drug trafficker. Section 853(n)(6)(A) does not furnish petitioner or any other general creditor with a right to have Reckmeyer discharge his debt out of assets that have been forfeited to the United States-especially where, as here, Reckmeyer lost his property interest in the assets before the debt arose.

The other statutory exemption applies where the defendant transferred specific property to a bona fide purchaser for value after the defendant committed the act giving rise to forfeiture. 21 U.S.C. (Supp. IV) 853(n)(6)(B). This provision, too, is plainly inapplicable here. Insofar as petitioner seeks payment out of assets that Reckmeyer never transferred to it, petitioner is not a "purchaser" of the assets at all, much less a bona fide purchaser for value. But see United States v. Reckmeyer, 836 F.2d 200, 205-208 (4th Cir. 1987). Reckmeyer did transfer \$25,480 in cash to petitioner on January 25, 1985, and petitioner placed that cash in an escrow account (Pet. App. 82a). But even assuming that petitioner would otherwise be regarded as a bona fide "purchaser" of that cash by accepting it as payment for past legal services, petitioner cannot claim to have been "reasonably without cause to believe" that the \$25,480 was subject to forfeiture under the CCE statute. The indictment seeking forfeiture of virtually all of Reckmeyer's assets had been returned ten days earlier, and the order restraining the transfer of Reckmeyer's assets had been entered 11 days earlier.

b. The court of appeals also correctly rejected petitioner's contention that the legislative history of the forfeiture statute furnishes a basis for an exemption that the statutory text forecloses. Petitioner relies (Pet. 21) on passages in the Senate Report stating that the provision permitting relief for bona fide purchasers "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (S. Rep. 98-225, 98th Cong., 1st Sess. 209 n.47 (1983)) and that the purpose of that provision "is to \* \* \* close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions" (id. at 200-201). As the court below held (Pet. App. 49a), however, those passages do not suggest that Congress intended that only sham or fraudulent transfers to third parties would be voided. See also Monsanto, 836 F.2d at 79-80 (the Senate Report "establishes with clarity only that 'bona fide purchasers' in the normal sense, i.e., those who have no notice of the property's taint, will not be subject to the forfeiture penalty. There is certainly no clear expression of an intention to exempt from forfeiture fees paid to attorneys who are on notice, solely because those payments constitute legitimate fees for actual services rendered."); Nichols, 841 F.2d at 1494. Compare Jefferson County Pharmaceutical Ass'n w. Abbott Laboratories. 460 U.S. 150, 159 n.18 (1983); CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 110-111 (1980).9

Petitioner's argument based on the Senate Report is not logically limited to assets the defendant proposes to use to pay attorney's fees; his argument would exempt all transfers to third parties, except where the government could establish fraud on the part of the transferee. That interpretation would effectively read out of the statute the language in Section 853(n)(6)(B) that explicitly limits relief to those transferees who are bona fide purchasers for value who were reasonably without cause to believe that the property was subject to forfeiture. See Pet. App. 6a-7a, 47a-48a; Nichols, 841 F.2d at 1494.

Petitioner also relies (Pet. 21) on a footnote in the House Report that discusses pre trial restraining orders, which states that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845, 98th Cong., 2d Sess. Pt. 1, at 19 n.1 (1984). However, that cryptic remark does not suggest that Congress intended to fashion a statutory exception for assets that might be used to pay an attorney. To the contrary, the next sentence in the footnote states: "The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case" (ibid.). That sentence "belies any intention to establish a statutory rule concerning forfeiture of attorney's fees" (Monsanto, 836 F.2d at 79). The only remaining question, then, is whether the Sixth Amendment

Moreover, the Senate Report elsewhere states that a defendant should not be shielded from for reiture "simply by transferring an asset to a third party" and that the 1984 amendments were necessary "to

preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture" (S. Rep. 98-225, supra, at 196). As the court of appeals observed, "[t]his passage reflects a clear congressional intent to make voidable a wider range of asset transfers than just sham or fraudulent ones" (Pet. App. 50a). Accord Nichols, 841 F.2d at 1494-1495.

requires special treatment for attorneys that Congress declined to fashion. As we shall now show, it does not.

2. The Constitutional Issue. Petitioner urges this Court to hold the statutory forfeiture provisions unconstitutional insofar as they do not allow a law firm to recover its fees for representing a defendant convicted of violating of the federal drug laws out of the illicit proceeds of the defendant's violation. The en banc court of appeals correctly rejected that constitutional challenge to the statute.

a. As the court of appeals observed, the forfeiture provisions "pose[] no threat whatsoever to the absolute right to be represented by counsel" (Pet. App. 8a), the core guarantee of the Sixth Amendment. If either a pretrial restraining order or the possibility of a post-conviction forfeiture order should deter attorneys from accepting a particular case on a fee basis because of uncertainty about whether they would collect a fee, the defendant's right to representation would be protected by the appointment of counsel (id. at 9a).

b. Thus, petitioner's argument is reduced to the claim that the forfeiture provisions violate the Sixth Amendment because they may interfere with the defendant's ability to hire counsel of his choice. This claim must be placed in its proper context. Section 853(a) does not provide for the forfeiture of "attorney's fees" as such. It provides for the forfeiture of all of the defendant's property that represents the illicit proceeds of his drug activities or his participation in the CCE enterprise, and it therefore mandates forfeiture based on the origins of the property, not the purposes to which the defendant might wish to devote it. Accordingly, Section 853 does not single out attorneys or their fees for adverse treatment: the defendant is equally barred from spending forfeited assets to purchase an automobile, groceries, or the assistance of an accountant.

Nor do the CCE forfeiture provisions impose an affirmative governmental bar to representation of the defendant by a particular attorney; any inability of the defendant to receive the services of a particular attorney results from that attorney's private decision to refuse to accept the employment in light of the defendant's financial circumstances—circumstances that in turn are attributable to the defendant's commission (or alleged commission) of acts that give rise to forfeiture. The operation of Section 853 therefore is quite unlike the disqualification order in Wheat v. United States, No. 87-4 (May 23, 1988), which constituted a direct governmental prohibition against the defendant's selection of a particular lawyer to represent him, but which nevertheless was sustained by the Court.

Petitioner's contention is undermined by the very decision upon which it chiefly relies (Pet. 13) in support of a defendant's right to be represented by counsel of his choice. Powell v. Alabama, 287 U.S. 45 (1932). The Court there made clear that the right is not absolute. The Court stated only that a court would violate "due process in the constitutional sense" if it "were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him" (id. at 69). The CCE forfeiture provisions have no such effect. They do not authorize a court to "refuse" to allow a defendant to be represented by an attorney whom he has employed. Nor do they "arbitrarily" prevent a defendant from employing an attorney. Any impact the CCE forfeiture provisions may have on a particular defendant's ability to be represented by a particular attorney is merely the incidental consequence of a statute of general applicability that is directed to other goals and that petitioner essentially concedes is valid as applied to all third-party claimants except lawyers. See Nichols, 841 F.2d at 1504-1505.

c. The Court's most recent decision discussing the right to counsel of choice, Wheat v. United States, supra, likewise refutes petitioner's contention. The Court stressed in Wheat that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers" (slip op. 6). Accordingly, "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects" (ibid.). For example, the defendant has no right to be represented by a person who is not a member of the bar (Leis v. Flynt, 439 U.S. 438 (1979)), by a person who is burdened by a conflict of interest (Wheat v. United States, supra), or by a person whose schedule cannot be adjusted to the requirements of the court's docket (Morris v. Slappy, 461 U.S. 1, 11-12 (1983)).

In addition, and of special relevance to this case, the Court made clear in Wheat that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant" (slip op. 6). Under the CCE provisions, title to the defendant's interests in assets that are subject to forfeiture vests in the United States immediately upon his commission of the acts giving rise to forfeiture. From that moment on, the defendant no longer owns the assets, and he therefore has no right to spend them to hire a lawyer. If the defendant has no other assets, he may be unable to afford to hire the attorney he prefers. As the Wheat case makes clear, however, the defendant's inability to afford a particular lawyer does not constitute a deprivation by the government of the defendant's qualified Sixth Amendment right to counsel of his choice.

If Christopher Reckmeyer had robbed a bank and been found with \$100,000 of the proceeds in his possession, he plainly would not have had a Sixth Amendment right to spend the \$100,000 to hire an attorney. As the en banc court below observed (Pet. App. 14a), the result should be no different here, where the assets involved are the illicit proceeds of Reckmeyer's drug activities. Indeed, if Reckmeyer had been found in the possession of several million dollars' worth of marijuana, it could not seriously be maintained that he would have had a Sixth Amendment right to have the government sell a portion of the marijuana and give the proceeds to him so that he could pay petitioner for legal representation. The result should be no different simply because Reckmeyer's criminal enterprise managed to sell the illegal drugs, so that Reckmeyer had the proceeds, rather than drugs, in his possession. The Constitution requires only that a court afford a defendant a "fair opportunity to secure counsel of his own choice" (Powell v. Alabama, 287 U.S. at 53), using whatever assets he has at his lawful disposal. A defendant is not denied that "fair opportunity" when he is barred from spending assets that he illegally acquired and are no longer his own. See Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting) (in a criminal case, the Sixth Amendment protects "the individual's right to spend his own money to obtain the advice and assistance of independent counsel"). For these reasons, the en banc court of appeals correctly "decline[d] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (Pet. App. 15a).

d. Petitioner seeks to denigrate the compelling governmental interest in obtaining the forfeiture of all of the defendant's assets that derive from his illicit drug activities by arguing that that interest would not be substantially

undermined by exempting assets that the defendant wishes to use to pay his attorney. See Pet. 16-19. But the same argument could be made in favor of exempting assets to enable the defendant to pay other expenses out of the assets he has forfeited to the United States. In any such situation, the effect would be to allow the defendant to profit from his illegal activities by enabling him to use the proceeds to discharge his contractual and other obligations to third parties. Congress chose not to fashion an exception for any such payments, and the Sixth Amendment does not invalidate that decision merely because the particular contractual obligation concerns the payment of attorney's fees. As the en banc court of appeals observed, "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent" (Pet. App. 21a). Furthermore, the public has a compelling interest in deterrence, and a "drug kingpin's certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars may make him less apprehensive about continuing in his business" (ibid.). Accord Nichols, 841 F.2d at 1505. Finally, "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture," because "[p]ublic cynicism and distrust of the legal system might grow as citizens watched huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege" (Pet. App. 21a-22a).

e. Where the indictment in a CCE case contains a count seeking an order of forfeiture of the proceeds of the defendant's drug ac ivities and his participation in the CCE enterprise, it; only after the verdict that it will be

finally determined whether the United States' asserted interest in the property is valid. If the defendant has no substantial assets other than those the government alleges to be the illicit proceeds of his criminal activities, the uncertainty about whether the defendant will have sufficient assets at the close of the trial to pay an attorney may lead the defendant's preferred attorney to decline to accept the case. But uncertainty about whether he will be paid is merely one of many reasons that might legitimately lead an attorney to decline to handle a case. As the court of appeals concluded (Pet. App. 13a), the situation is the same for purposes of constitutional analysis as when a defendant's assets are subject to a claim or lien by another creditor, which likewise can cause prospective defense counsel to decline the representation because of uncertainty about whether he will be paid. In neither case does the attorney's uncertainty result in a violation of the Sixth Amendment.

In any event, whatever may be the distinct Sixth Amendment issues that are presented in the pretrial context by a forfeiture count in the indictment (or a pretrial restraining order), no such issues are presented in this case. Petitioner did not withdraw from its representation of Reckmeyer after the restraining order was issued and the indictment was returned. As a result, Reckmeyer received the "Assistance of Counsel" of his choice throughout the proceedings, and Reckmeyer's guilty plea has now conclusively determined that the assets in question were properly forfeited to the United States. By staying in the case, petitioner assumed the risk that it might not be able to recover its fees, either from Reckmeyer directly or by filing a third-party claim for relief from forfeiture. The incidental effect of the forfeiture provisions on petitioner's private contractual claim against Reckmeyer does not rise to the level of a violation of Reckmeyer's Sixth Amendment right to counsel. This case is therefore not an appropriate one in which to consider the constitutionality of the forfeiture statute when it affects a defendant's interest in being represented by counsel of his choice, since Christopher Reckmeyer enjoyed the representation of counsel of his choice throughout the proceedings against him.<sup>10</sup>

#### CONCLUSION

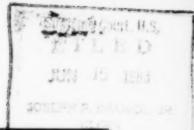
The petition for a writ of certiorari should be denied. Respectfully submitted.

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internal guidelines to assure that the forfeiture provisions are invoked with caution where they may have an effect on fees paid to attorneys. See 38 Crim. L. Rep. (BNA) 3001 (1985); Pet. App. 56a-57a & n.8. Those guidelines greatly undermine petitioner's extravagant assertions (Pet. 24-26) about the possible adverse consequences of the court of appeals' holding that attorney's fees are not altogether exempt from forfeiture. Similarly, as even the panel below concluded (Pet. App. 60a-61a), any contention that the forfeiture provisions may lead to ineffective assistance of counsel in a particular case because of the attorney's financial interest in the outcome must be considered in the factual context of a concrete claim to that effect. Petitioner does not suggest that there was any such defect in its representation of Reckmeyer.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,

Petitioner

V.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1729

CAPLIN & DRYSDALE, CHARTERED,

Petitioner

V

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

The Solicitor General's brief in opposition is a curious document. Rule 22.1 of this Court's Rules states that a brief opposing certiorari should "disclos[e] any matter or ground why the cause should not be reviewed by this Court." The Government's submission reads more like a brief on the merits, for it devotes a scant page to the discretionary factors that affect this Court's decision at the certiorari stage. We will focus in this reply on those discretionary factors, then briefly address the Government's merits argument.

1. The Government concedes (Br. in Opp. 9) that a conflict among the circuits existed, at least on the statutory question, at the time we filed our petition.

The Government points out, however, that two of the decisions on which we predicated the conflict—United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987), and United States v. Jones, 837 F.2d 1332 (5th Cir. 1988)—have been vacated by their respective courts en banc. Given the pendency of these rehearings en banc, the Government asserts that there is now "no conflict among the circuits and thus no need for review by this Court" (Br. in Opp. 9).

Contrary to the Government's assertion, a conflict among the circuits still exists, since the Fifth Circuit has not vacated its prior decision in United States v. Thier, 801 F.2d 1463 (1986), modified, 809 F.2d 249 (1987), which likewise conflicts with the decision below. See Pet. 10-11. Although this conflict concededly has been placed in a state of some suspense by the Fifth Circuit's grant of en banc review in Jones, we believe that the questions presented here are sufficiently important to warrant this Court's attention now, without awaiting the outcome of the two en banc proceedings. See pages 3-5, infra. But if the Court disagrees with our submission in this respect, it should at least hold our petition pending the outcome of those cases. The Government's suggestion that certiorari be denied in these circumstances seems manifestly unfair, since we have timely identified a circuit conflict that may well persist despite the pending rehearings en banc.1

2. The Government does not dispute—indeed, it does not address—our contentions (Pet. 22-26) as to the importance of the questions presented. The pressing nature of these questions is underscored by the American Bar Association in its amicus curiae brief urging that certiorari be granted. Within a recent three-month period, no fewer than four courts of appeals—the Second, Fourth, Fifth, and Tenth Circuits—have grappled inconclusively with attorney fee forfeiture. The federal district courts, which must routinely encounter questions about how criminal defendants shall be represented, have adopted equally disparate stances.

As the ABA points out, moreover, the number of litigated cases, large though it is, opens but a small window on the problem. "Attorneys in private practice must confront on a daily basis the ethical and professional dilemmas now attendant upon the acceptance of compensation in criminal cases" (ABA Am. Br. 6). In literally every case in which a RICO or CCE count is foreseeable or charged, the prospect of fee forfeiture will adversely affect attorneys' performance and defendants' ability to secure private counsel. As we noted in our petition (at 22), the decision below may prevent targets of a criminal investigation from being represented by any counsel during grand jury proceedings—a point that the Government has not disputed.<sup>2</sup>

the Government's subsequent petition for rehearing in Under-

wood. Br. for Res. in No. 85-516, at 6. The Government accordingly urged the Court to hold the *Dubose* petition pending the outcome of the *Underwood* rehearing. *Ibid*. The Court did so, eventually granting the Government's petition in *Underwood*. See Pierce v. Underwood, No. 86-1512 (argued Dec. 1, 1987).

The Government has previously urged the Court to hold a petition in circumstances like these. In *Dubose v. Pierce*, No. 85-516, petitioner pointed to a conflict with the Ninth Circuit's decision in *Underwood v. Pierce*, 761 F.2d 1342 (1985). The Government filed a memorandum in *Dubose* acknowledging the conflict but noting that the conflict "may disappear" in view of

<sup>&</sup>lt;sup>2</sup> The Government suggests in a footnote (Br. in Opp. 22 n.10)

As this Court has observed, the "Sixth Amendment guarantees the accused \* \* the right to rely on counsel as a 'medium' between him and the State." Michigan v. Jackson, 475 U.S. 625, 632 (1986) (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)). Attorney fee forfeiture poses a serious threat to the independence of the defense bar and to our adversarial system of justice. Because it may be many months before the pending en banc proceedings are concluded—reargument in Jones is not scheduled until September—this Court should act now to resolve the questions presented in the petition.

3. The Government repeatedly reminds the Court that the predicate offenses of the CCE count here were "illegal drug activities" (Br. in Opp. 11, 16, 19, 20). As we note in our petition, however, the reach of the forfeiture statute is by no means coterminous with the Nation's war against narcotics. The principle established by the decision below will extend through the RICO statute to a variety of white-collar criminal prosecutions. The expansive reach of fee forfeiture is illustrated by recent press reports about the difficulties experienced by E. Robert Wallach in retaining a

that the situation is less dire than we contend, stating that the Justice Department "has promulgated internal guidelines to assure that the forfeiture provisions are invoked with caution where they may have an effect on fees paid to attorneys." But these guidelines require advance approval from the Criminal Division only when an indictment seeks forfeiture of assets already in the hands of an attorney. No such caution is required in the more common situation where the indictment seeks blanket forfeiture of assets in the defendant's hands, even though such an indictment will have an equally severe impact on the defendant's ability to hire counsel. In any event, these guidelines lack the force of law and may be changed at any time.

lawyer when, after being indicted on RICO charges for his role in the Wedtech affair, the bulk of his assets were frozen by a temporary restraining order. See Nat'l L. J., Apr. 4., 1988, at 2; Am. Law., June 1988, at 3. Contrary to the Government's suggestion, therefore, the defendant's status as a drug dealer cannot be used to minimize the importance of the questions presented here.

4. The Government suggests (Br. in Opp. 9, 20-21) that "this case is not a suitable vehicle" for considering the propriety of attorney fee forfeiture, noting that the instant challenge is raised, not by a defendant in a pre-trial setting, but by a law firm seeking recovery in a post-conviction proceeding. The precise nature of the Government's objection is unclear. The court of appeals explicitly held that "Caplin & Drysdale is \* \* \* a proper party to assert Sixth Amendment objections to fee forfeiture" and that both the statutory and the constitutional questions are squarely presented here. Pet. App. 7a-8a. The Government in opposing certiorari does not challenge these holdings; to the contrary, it devotes thirteen pages of its brief to discussion of the merits. It may be that a law firm in a post-conviction setting occupies a less sympathetic position than does a defendant who contends, prior to trial, that the Government's forfeiture allegations prevent him from hiring a lawyer. But that has nothing to do with this Court's jurisdiction to hear, or its ability to resolve, the important questions presented by our petition.3

<sup>&</sup>lt;sup>3</sup> Indeed, this case is in some respects a preferable vehicle for addressing these issues. Given the exigencies of criminal trial schedules, pre-trial challenges to attorney fee forfeiture will often

5. The Government errs in contending (Br. in Opp. 18-19) that its position is buttressed by this Court's recent decision in Wheat v. United States, No. 87-4 (May 23, 1988). The Court in Wheat unequivocally held that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment" (56 U.S.L.W. at 4443). The Court ruled, however, that the "Sixth Amendment presumption in favor of counsel of choice" may be "overcome \* \* \* by a showing of a serious potential for conflict [of interest]" on the part of the defendant's chosen counsel (id. at 4443, 4444). 'The Court stressed that the conflicts potentially created by a lawyer's representation of multiple defendants jeopardize "[n]ot only the interest of [the] criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases" (id. at 4443).

In the instant case, all the considerations advanced in Wheat to support denial of the defendant's counsel of choice point exactly the other way. First, any attorney willing to represent a defendant faced with

wash out before they reach this Court. Such challenges, moreover, will often involve—as was true in Monsanto, supra—the
alleged need for a pre-trial mini-hearing at which the Government will have the burden of proving the likelihood of forfeiture.
Before undertaking to define the contours of such a proceeding,
it makes sense to delimit the showing that a claimant must make
at the post-conviction hearing required by 21 U.S.C. § 853(c)
and (n)(6). We contend that an attorney can qualify as a "bona
fide purchaser" by showing the absence of sham or fraud; the
Government contends that an attorney must demonstrate ignorance of the illicit source of his client's funds. To opine on
the need for a pre-trial hearing before deciding this fundamental
statutory question, to say nothing of the basic constitutional
question, would put the cart before the horse.

broad forfeiture counts will confront a "serious potential for conflict" (56 U.S.L.W. at 4444) between his obligation faithfully to represent his client and his desire to retain his fee. See Pet. 23-24. Second, since the issuance of an indictment with a broad forfeiture count will, in the Government's view, put defense counsel on notice that his client's assets are forfeitable, an ethical lawyer who has represented his client throughout the grand jury proceedings may be forced to resign (or be disqualified on the Government's motion because of a potential conflict under Wheat), thereby substantially impairing the quality of the client's defense and "the institutional interest in the rendition of just verdicts in criminal cases" (56 U.S.L.W. at 4443). Third, whereas the counsel-ofchoice issue in Wheat was limited to whether a particular lawyer could represent the defendant, the impact of fee forfeiture will be to eliminate, at the discretion of the prosecutor, the entire universe of ethical retained counsel. As the panel in this case noted (Pet. App. 63a), the effect of the Government's including a broad forfeiture count in a CCE or RICO indictment is the same as if Congress had passed a law dictating what lawyers a defendant might retain, or placing a cap on the fee that his chosen lawyer might be paid.

6. On the merits, the Government's position is marred by the same question-begging approach that infected the reasoning of the *en banc* court below. The Government pitches its argument squarely on the statute's "relation back" provision, asserting that a defendant ceases to own his assets at the moment he performs an act subsequently alleged to be a crime (Br. in Opp. 11, 13, 18, 19). Since paupers have no

right to counsel of choice, the Government reasons, a person facing forfeiture is no different from any other indigent defendant who may permissibly be forced to rely on court-appointed counsel.

What the Government's brief assiduously ignores is that the forfeiture provisions are explicitly penal in nature and attach only upon the defendant's conviction of the underlying crime. 21 U.S.C. § 853(a); 18 U.S.C. § 1963(a). Absent conviction, the property sought to be forfeited does not vest in the Government, regardless of how illegitimately the defendant may have employed his wealth. Thus, as we contend in our petition (at 20-22), the "relation back" provision is properly viewed as a mechanism for preventing fraudulent conveyances of the defendant's assets, not as a device for determining true title to property.

The Government's argument likewise ignores its own responsibility for depriving the defendant of his ability to retain counsel. As the Solicitor General would have it, the defendant's quandary stems from the "attorney's private decision to refuse to accept the employment in light of the defendant's financial circumstances—circumstances that in turn are attributable to the defendant's commission (or alleged commission) of acts that give rise to forfeiture" (Br. in Opp. 17). But the defendant's "financial circumstances" result, not from the laws of nature or economics, but from the Government's decision to seek forfeiture

of his assets—a decision that rests entirely in the discretion of the prosecutor. As the Government grudgingly concedes in its parenthesis, moreover, the defendant's forced indigency arises from the prosecutor's allegations of criminal conduct, not its proof. In short, it is only by attempting to play Pontius Pilate, disclaiming any responsibility for the defendant's impecuniousness, that the Government can avoid addressing the balancing of interests called into play by the "Sixth Amendment presumption in favor of counsel of choice" (Wheat, 56 U.S.L.W. at 4443).

Finally, the Government is on weak ground when it embraces the Fourth Circuit's notion that "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture." Br. in Opp. 20 (quoting Pet. App. 21a). Public confidence in the judicial system is far more likely to be impaired by the spectacle of defendants' being purposefully rendered indigent by the Government before trial, particularly where the circumstances suggest that forfeiture claims are being used selectively to remove unusually competent adversaries. As this Court observed in Wheat, trial judges must be alert to the possibility that "the government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side" (56 U.S.L.W. at 4444). A cardinal value of the Sixth Amendment is that "legal proceedings appear fair to all who observe them" (id. at 4443). A system that affords the Government "the discretion to restrict the resources available to its opponent to contest the very allegations at issue" is unlikely to seem fair either to the citizenry or to the

<sup>&</sup>lt;sup>4</sup> Assets potentially subject to forfciture thus differ from the proceeds of a bank robbery (Br. in Opp. 19), since the bank's claim, unlike the Government's, is not based on a penal statute. Assets subject to forfeiture likewise differ from "several million dollars' worth of marijuana" (*ibid.*), since no defendant can have legal title to contraband.

bar, for it "is no longer an adversarial system within the rubric of our American tradition" (ABA Am. Br. 12).

## CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

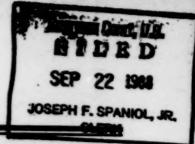
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June 15, 1988





# In the Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1729

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

ν.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

#### SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General files this supplemental brief to call the Court's attention to two decisions of other courts of appeals that address issues closely related to those presented by the petition for a writ of certiorari in this case. In our brief in opposition to the certiorari petition, which was filed on June 9, 1988, we urged the Court to deny the petition, primarily because there was no firm conflict among the circuits on the statutory and constitutional issues presented. See Br. in Opp. 8-9. Since that time, however, the Second Circuit, sitting en banc, has rendered its sharply divided decision in United States v. Monsanto, No. 87-1397 (July 1, 1988), and a panel of the Eighth Circuit has rendered a decision in United States v. Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium, etc. (Kiser), No. 87-2499 (Aug. 5, 1988), petition for rehearing en banc pending (filed Sept. 16, 1988). On September 14, 1988, we filed a petition for a writ of certiorari to review the judgment of the en banc Second Circuit in the first of these cases. *United States* v. *Monsanto*, petition for cert. pending, No. 88-454. We believe that in light of the decisions in *Monsanto* and *Kiser*, the Court should grant certiorari in the present case as well.

1. The en banc Second Circuit held in *Monsanto*: (i) that a pretrial restraining order that has the effect of preventing the defendant from retaining counsel of his choice must be vacated or modified to the extent necessary to permit the defendant to pay legitimate (i.e., non-sham) attorney's fees, and (ii) that any fees actually paid to an attorney will thereafter be exempt from forfeiture under 21 U.S.C. (Supp. IV) 853(c), even if the defendant is subsequently convicted and the jury returns a special verdict finding that the assets were the proceeds of his illegal drug activities. The en banc court's disposition was set forth in a brief per curiam opinion (*Monsanto*, slip op. 4743-4746), which was followed by eight separate opinions concurring in or dissenting from that disposition.

Eight of the twelve judges on the en banc court voted to vacate the restraining order, but they were divided on their reasons for doing so. Three judges concluded that Section 853 does provide for the forfeiture of assets that the defendant wishes to use to pay his attorney, but that the statute is unconstitutional under the Sixth Amendment to the extent it does so. *Monsanto*, slip op. 4746-4750 (opinion of Feinberg, C.J.). Three other judges declined to reach the Sixth Amendment issue, because they concluded

that the statutory provision authorizing the issuance of a pretrial restraining order, 21 U.S.C. (Supp. IV) 853(e)(1), should be construed to exempt all "ordinary" expenditures (including those for attorney's fees), and that assets actually transferred to an attorney as payment of attorney's fees must thereafter be exempt from forfeiture under 21 U.S.C. (Supp. IV) 853(c). Monsanto, slip op. 4753-4766 (opinion of Winter, J.). The two remaining judges in the majority concluded that Section 853 does not exempt assets used to pay attorney's fees and that application of the statute in this manner would not violate the Sixth Amendment if the government established at an adversarial hearing that there was a likelihood that the jury would find the property in question to be the proceeds of the defendant's illegal drug activities; but those two judges concluded that Section 853(e)(1)(A) does not permit a district court to hold such a hearing. Monsanto, slip op. 4766-4768 (opinion of Miner, J.).<sup>2</sup>

The decision of the en banc Second Circuit in Monsanto squarely conflicts with the ruling by the Tenth Circuit in United States v. Nichols, 841 F.2d 1485 (1988), which sustained a pretrial restraining order that had the effect of preventing the defendant from using the restrained assets to pay his attorney. The decision in Monsanto also is in tension with the en banc decision of the Fourth Circuit in the instant case, which rejected statutory and constitutional claims that attorney's fees are exempt from forfeiture. For these reasons, and because questions concerning the application of the forfeiture statutes in this setting are important and recurring, we have filed a petition for a writ of certiorari to review the judgment of the en banc Second Circuit in Monsanto.

All citations are to the amended opinion of the en banc court of appeals. The amended opinion only changed the order of the separate opinions concurring in or dissenting from the court's per curiam opinion; the content of the separate opinions, as originally issued on July 1, 1988, was not amended.

<sup>&</sup>lt;sup>2</sup> Judges Mahoney, Cardamone, Pierce, and Pratt each filed a separate dissenting opinion (slip op. 4769-4790).

2. In Kiser, the Eighth Circuit did not resolve the question whether the Sixth Amendment would absolutely bar the forfeiture of assets that the defendant wishes to use to pay an attorney. The panel instead held that the property in question, which had been restrained in parallel civil forfeiture proceedings, must be transferred to defense counsel, because the government had not established at an adversarial hearing that there was a likelihood that the property would be found by the jury in the criminal prosecution to be forfeited to the United States. The panel further held that the property would thereafter be exempt from forfeiture even if the defendant is ultimately convicted.<sup>3</sup>

3. As we explain in the petition for a writ of certiorari in *Monsanto*, 4 in light of these recent development, we believe that the statutory and constitutional questions arising from the application of the forfeiture statutes to assets that are used (or to be used) to pay an attorney warrant review by this Court. We urge the Court to grant the petition in *Monsanto* because of the square conflict between the Second Circuit's decision in that case and the Tenth Circuit's decision in *Nichols* concerning the circumstances

in which a district court may enter a pre-conviction restraining order that has the effect of preventing the defendant from transferring assets to a lawyer in payment of attorney's fees.

By contrast, although the district court also entered a pre-conviction restraining order in this case, defendant Reckmeyer pleaded guilty before the district court ruled on his motion to vacate that order, and he accordingly had no occasion to appeal it. Nor was the restraining order subject to review by the Fourth Circuit on the government's appeal of the district court's order granting petitioner Caplin & Drysdale's application for payment of its attorneys' fees out of the forfeited estate. The instant case therefore does not present the Court with an occasion to consider questions concerning the propriety of and the procedural prerequisites to the issuance of restraining orders in this setting. Moreover, because petitioner Caplin & Drysdale chose to remain as counsel for defendant Reckmeyer despite the risk that it would not be paid, this case does not present an occasion for the Court to consider the constitutionality of Section 853 where it actually has had the effect of deterring the defendant's counsel of choice from representing him in the prosecution. For these reasons, we do not believe that this case would be a suitable vehicle, standing alone, for resolution of several of the important constitutional and statutory issues that have arisen in this general area. We therefore have asked the Court to review the Second Circuit's decision in Monsanto to address those issues.

At the same time, however, we believe that the instant case would be a good companion to *Monsanto*, and we therefore urge the Court to grant the petition in this case as well and to consolidate it with *Monsanto* for purposes of oral argument. *Monsanto* involves a *pre-*conviction challenge by the *defendant* to a restraining order that has

<sup>&</sup>lt;sup>3</sup> On September 16, 1988, the United States filed a petition for rehearing, with suggestion for rehearing en banc, in *Kiser*. In that petition, we requested the en banc court either to address the question whether the Sixth Amendment absolutely bars application of the forfeiture statutes in this setting, or at least to remand the case to the district court in order to afford the government an opportunity to make the showing that the panel had held to be required, since that issue had not been raised in the district court. In the event the court was not prepared to grant that relief, however, we asked the en banc court to hold the rehearing petition and to dispose of it in light of this Court's disposition of the petition for a writ of certiorari in *Monsanto*.

<sup>4</sup> We have furnished petitioner Caplin & Drysdale with a copy of the certiorari petition in Monsanto.

the effect of temporarily barring the defendant from transferring assets to his attorney, while this case involves a post-conviction motion by counsel to receive payment of their fees out of assets that already have been finally determined by the district court to be the illegal proceeds of (or otherwise associated with) the defendant's illegal drug activities. In our view, the Court's consideration of the full range of statutory and constitutional issues that have arisen in the lower courts would be assisted by having before it two cases that are in these different postures and involve parties who have somewhat different perspectives. We note as well that if the Court were to grant certiorari only in Monsanto and then affirm the judgment of the Second Circuit on grounds that pertain only to the issuance of a pretrial restraining order, the Court's decision would not control this case. Although we argue in Monsanto that the judgment of the Second Circuit should be reversed - a disposition that, a fortiori, would establish the correctness of the Fourth Circuit's judgment in this case - the possibility that the Court could find the differences between the two cases to be significant for purposes of statutory or constitutional analysis leads us to conclude that it would be appropriate for the Court to grant review in both.5

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case should be consolidated for purposes of oral argument with *United States* v. *Monsanto*, petition for cert. pending, No.88-454 (filed Sept. 14, 1988).

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

<sup>&</sup>lt;sup>5</sup> The decision of the en banc Fourth Circuit in this case conflicts with *United States* v. *Jones*, 837 F.2d 1332 (5th Cir. 1988), which held that defense counsel may recover fees out of assets that have already been declared forfeited to the United States. However, as we have pointed out (Br. in Opp. 9 & n.7), the Fifth Circuit has granted the government's petition for rehearing en banc in *Jones*. Oral argument on rehearing en banc in *Jones* was held on September 19, 1988.

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No. 87-1729

# IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,

Petitioner.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

#### SUPPLEMENTAL BRIEF FOR THE PETITIONER

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## IN THE

# Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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### SUPPLEMENTAL BRIEF FOR THE PETITIONER

We file this brief, pursuant to this Court's Rule 22.6, in response to the Solicitor General's Supplemental Brief in this case and to the filings by the Solicitor General and the respondent in *United States v. Monsanto*, No. 88-454 (petition for cert. pending). We also wish to bring to the Court's attention a recent court of appeals decision of relevance to the questions presented here.

We are providing the respondent in Monsanto with a copy of this brief.

1. We agree with the Solicitor General's submission in his Supplemental Brief (at 4-7) that certiorari should be granted both in the instant case and in Monsanto. We disagree, however, with his suggestion (Supp. Br. 7) that the cases should be consolidated for oral argument. Although the Sixth Amendment issues in the two cases are ultimately similar, the cases are sufficiently different, owing to their respective post-conviction and pre-trial contexts, that divergent legal analyses may apply. We believe that a single consolidated argument in these circumstances would be inadequate and possibly confusing. In this respect, the instant cases resemble the two drug-testing cases currently before the Court (NTEU v. Von Raab, No. 86-1879, and Burnley v. Railway Labor Exec. Ass'n, No. 87-1555), which the Court has ordered to be argued seriatim. See 56 U.S.L.W. 3831 (May 31, 1988).

We thus agree with the respondent in Monsanto (Br. in Opp. in No. 88-454, at 14) that the instant case and Monsanto should "be heard in tandem, with separate briefs and separate oral argument." If the Court declines this suggestion, we think that consolidation is the next best alternative. It is extremely important to the Government and the Bar that this Court decide the validity of attorney-fee forfeiture both in the pre-trial and in the post-conviction setting. If the Court were to grant review in one case and hold the other, there is a substantial possibility that its decision would not resolve both issues, leading to piecemeal litigation that the lower courts can ill afford. Should the Court choose not to accord two hours of total argument time to the questions presented, therefore, we urge that the Solicitor General's suggestion of consolidation be adopted.

- 2. In opposing certiorari in Monsanto, the respondent suggests (Br. in Opp. in No. 88-454, at 12-13) that this Court should defer granting review "to allow Congress to consider the question in the first instance." This suggestion is completely unrealistic. The committee hearings cited by the respondent (id. at 12) date largely from 1985. As far as we are aware, there are no bills currently pending in Congress that even address the questions presented here; the respondent in Monsanto certainly cites none. Under these circumstances, the prospect of legislative resolution is both speculative in fact and remote in time. Given the perplexity that now exists in the lower courts-a point we address below-this remote possibility should be accorded no weight in this Court's decision about certiorari.
- 3. A panel of the Seventh Circuit recently issued a decision on the constitutionality of attorney-fee forfeiture. See United States v. Moya-Gomez et al., Nos. 87-1262, 87-1280, 87-1310, 87-1390 & 87-1670 (Sept. 30, 1988) (available at 1988 Westlaw 103424). The court there rejected a Sixth Amendment challenge to the application of the forfeiture statute. But it sustained a Fifth Amendment challenge, holding that "the present statutory scheme \* \* violates the due process clause when it results in preventing the defendant from using the restrained funds to secure the services of counsel of choice" (slip op. 35).

The Seventh Circuit's ruling compounds the confusion in the courts of appeals. Six circuits have now ruled on the questions presented here. No circuit has agreed precisely with any other as to the proper mode of constitutional analysis, or as to the procedures to

be followed when a defendant faced with a forfeiture count seeks to retain private counsel.

These facts show the error of the respondent's suggestion in Monsanto (Br. in Opp. in No. 88-454, at 10) that certiorari should be denied because "further percolation and ongoing dialogue among the lower courts might well be fruitful." The "percolation" rationale for deferring certiorari is that the courts of appeals, if left to their own devices, will eventually settle upon a single, coherent resolution. The courts show no evidence of moving in that direction here. Quite the contrary: each successive decision has spun off on a new tangent, increasing the level of entropy in the system. The courts of appeals are undeniably in disarray, and this disarray is intolerable for district courts that must decide daily how criminal defendants shall be justly represented.

#### CONCLUSION

For these reasons and those stated in our petition, the petition for a writ of certiorari should be granted, and the case should be set for argument in tandem with *United States v. Monsanto*, No. 88-454 (petition for cert. pending).

Respectfully submitted,

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### IN THE Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,

Petitioner

V.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE
OF THE AMERICAN BAR ASSOCIATION
IN SUPPORT OF THE PETITIONER

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# In The Supreme Court of the United States

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UNITED STATES OF AMERICA,
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BRIEF AMICUS CURIAE
OF THE AMERICAN BAR ASSOCIATION
IN SUPPORT OF THE PETITIONER

#### INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 300,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges, legislators, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. From its inception more than

100 years ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel in our adversarial system of criminal justice. Because the forfeiture of bona fide attorney's fees impairs the right to counsel and undermines the adversarial system of criminal justice, the ABA seeks to appear as amicus curiae in this case.<sup>1</sup>

The ABA recognizes that the Government has a legitimate interest in the forfeiture of assets obtained through criminal activity. The ABA specifically condemns fee payments used as a sham to hide the defendant's assets. The ABA opposes, however, government-initiated restraints upon the payment of fees for representation in criminal cases, or the forfeiture of such bona fide fees.

After Congress enacted the Comprehensive Forfeiture Act of 1984 (the "CFA"), the ABA examined the impact of the enhanced forfeiture laws when applied to fee payments and identified their adverse consequences for our adversarial justice system. Pre-trial restraints on the payment of bona fide fees prevent the accused from using his assets to retain counsel of choice even before the adjudication of guilt or innocence or any verdict of forfeiture concerning those assets. Further, the mere prospect of fee forfeiture may deter many lawyers from undertaking a criminal representation. In addition to the risk of not receiving payment, defense counsel face ethical rules which prohibit them from undertaking any representation in which payment is dependent upon the outcome of trial. These constraints may impair defendant's ability to obtain adequate representation by counsel.

Equally troubling, those who proceed with the representation will have a financial disincentive to prepare the case thoroughly. The sole statutory criterion available to counsel for relief from a forfeiture verdict is a showing that counsel had no knowledge that the assets were forfeitable. See 18 U.S.C. § 1963 (l) (6); 21 U.S.C. § 853 (n) (6). Hence, defense counsel may render himself ineligible for relief by acquiring knowledge of the financial affairs of the defendant.

Finally, the Government's discretionary power to add allegations of forfeiture gives the Government an unfair tactical advantage—the power to force the withdrawal of retained counsel at a time of the Government's choosing.

For all of these reasons, the ABA regards the forfeiture of bona fide fees as violative of the defendant's Fifth and Sixth Amendment rights to counsel of choice, to the effective assistance of counsel, and to due process of law.

The ABA appears here in order to underscore the increasing need for a definitive resolution of the issues raised in the petition. Members of the bar are struggling daily with the difficult legal and ethical questions raised by the practice of fee forfeiture. While litigation over the constitutionality of fee forfeiture has proliferated, it has not provided clear guidance. The continuing uncertainty over the permissibility of fee forfeiture and the necessity that such issues be relitigated in every case stand as powerful deterrents to the acceptance of representations. Litigation over fees will inevitably continue, absorbing energies that would be better directed to the adjudication of guilt or innocence and to the discharge of the duties of an otherwise overburdened federal judiciary.

The ABA submits that the best interests of the criminal justice system lie in a prompt resolution of the issues raised by the petition.

<sup>&</sup>lt;sup>1</sup> Letters from the parties consenting to the filing of this amicus brief have been filed with the Clerk of the Court.

#### REASONS FOR GRANTING THE WRIT

#### I. THE ISSUES PRESENTED IN THE PETITION HAVE NATIONAL IMPORTANCE AND REQUIRE PROMPT REVIEW

The statutory and constitutional issues raised by the petition have national importance. Uncertainty over these unresolved issues affects the representation of criminal defendants in both reported and unreported cases.

The recent wave of en banc and split panel decisions testifies to the importance and controversial nature of the issues raised by attorney fee forfeiture. As of this date, in three of the four circuits to address this issue, the original panel opinion has been vacated in order to permit rehearing en banc.<sup>2</sup> Moreover, each appellate decision addressing the issues, except the panel opinion reversed below, has had a dissenting or concurring opinion.<sup>3</sup>

In these decisions, the federal courts have struggled to accommodate the Government's interest in enforcement of the forfeiture laws, the defendant's constitutional rights, and the public's need for a vigorous criminal defense bar. But the results have been inconclusive. The courts of appeals have used different analyses, offered different procedural resolutions, and used different legal standards, thus magnifying the uncertainty for the participants in the criminal justice system.

For example, the decision below takes the position that the convicted defendant has no property interest in the forfeited assets as of the date the crime is committed and that no relief was authorized for the payment of bona fide attorney's fees. The Second Circuit, however, has ruled that in order to protect the defendant's constitutional rights, a pre-trial mini-hearing is required at which the Government will have the burden of proving the likelihood of forfeiture. United States v. Monsanto, 836 F.2d 74, 83-84 (2d Cir. 1987), rehearing en banc granted (January 29, 1988). Conversely, the Fifth Circuit has indicated that relief with respect to attorney's fees would be available at a post-trial hearing. United States v. Jones, 837 F.2d 1332 (5th Cir. 1988), rehearing en banc granted (April 26, 1988); United States v. Thier, 801 F.2d at 1474.

Moreover, the legal standards proposed for exemption of attorney's fees are conflicting. The decision below firmly states: "[W] here an attorney chooses to accept payment in assets named in a forfeiture indictment or a huge cash sum, any later attempts to avoid knowledge would be insufficient to qualify the attorney as a bona fide purchaser." App. at 18a. Two Fifth Circuit panels, in contrast, have held that "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services." United States v. Jones, 837 F.2d at 1334; United States v. Thier, 801 F.2d at 1474, as modified, 809 F.2d at 249. Along the same lines, the Second Circuit panel has required that the Government produce prior to trial "evidence independent of the indictment" sufficient to show the likelihood of conviction and forfeiture, or forever lose the right to forfeit attorney's fees. United States v. Monsanto, 836 F.2d at 83.4

<sup>&</sup>lt;sup>2</sup> Pet. at 7; United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987), rehearing granted (January 29, 1988); United States v. Jones, 837 F.2d 1332 (5th Cir. 1988), rehearing granted (April 26, 1988).

<sup>&</sup>lt;sup>3</sup> See, e.g., United States v. Nichols, 841 F.2d 1485, 1509 (10th Cir. 1988) (Logan, J., dissenting); United States v. Monsanto, 836 F.2d 74, 85 (2d Cir. 1987) (Oakes, J., dissenting); Caplin & Drysdale, App. at 26a (4th Cir. 1988) (Phillips, J., dissenting); United States v. Jones, 837 F.2d 1332, 1336 (5th Cir. 1988) (Davis, J., concurring); United States v. Thier, 801 F.2d 1463, 1475 (5th Cir. 1986) (Rubin, J., concurring).

<sup>&</sup>lt;sup>4</sup> See also United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987); United States v. Long, 654 F.2d 911, 915-16 (3d Cir. 1981) (In pre-trial hearings on restraining orders, "the government cannot rely on indictments

This melange of decisions does not provide adequate guidance for those directly involved in the representation of criminal defendants. Attorneys in private practice must confront on a daily basis the ethical and professional dilemmas now attendant upon the acceptance of compensation in criminal cases. Thus, it is essential that this Court confront those issues promptly, and define the ground rules for the criminal justice system.

Moreover, the consequences of fee forfeiture are not limited to defendants or their private counsel. Public defenders are also concerned that our system of appointed representation cannot afford the burdens associated with systematic substitution of appointed counsel into complex criminal cases. These added burdens will fall on truly indigent defendants, the original constituency of our system of appointed counsel, who will compete with non-indigent defendants for the resources of federally appointed defenders.

Finally, the potential impact of the forfeiture statutes is far-reaching. The use of the criminal forfeiture sanction within the criminal code has recently been expanded. Criminal forfeiture, including the prospect of fee forfeiture, is a permissible punishment not only for all felony drug offenses, but also for all violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. Criminal offenses as divergent as securities fraud and obscenity can form the basis for a government claim for criminal forfeiture. See 18 U.S.C.

§ 1961(1). Thus, it has been estimated that as many as 25% of the criminal cases brought in federal court now involve offenses subject to criminal forfeiture. See United States v. Nichols, 841 F.2d at 1488. In addition, Congress, in 1984 and again in 1986, amended the criminal forfeiture laws to increase significantly the breadth of the assets subject to forfeiture.

The increased role that Congress has given criminal forfeiture in our criminal justice system means that the continuing uncertainty over fee forfeiture will affect growing numbers of cases. As a practical matter, until this Court speaks, defense counsel will be obliged to litigate the constitutionality of fee forfeiture in virtually every case where it is sought.

More important, wholly apart from the litigated cases, fee forfeiture is affecting the practice of law in many situations that never become public. It is often difficult to determine the source of a client's fee payments. Thus, defense attorneys are presently reluctant to accept representation in a wide range of criminal cases where forfei-

alone."). Contra United States v. Nichols, 841 F.2d 1485, 1505 (10th Cir. 1988) (restraining order against fee transfer can be based on indictment alone).

<sup>&</sup>lt;sup>3</sup> See Concerning Forfeiture of Attorney's Fees: Hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (May 13, 1986) (Statement of Federal Public Defender Edward Marek on behalf of Federal Public Defenders and Federal Community Defenders).

<sup>&</sup>lt;sup>6</sup> In 1984, for example, Congress expanded the class of offenses for which criminal forfeiture is possible to include all drug offenses, violations of the Currency and Foreign Transactions Reporting Act, and obscenity offenses. See 18 U.S.C. § 1961(1). In 1986, Congress created broad new money-laundering offenses, codified at 18 U.S.C. §§ 1956, 1957, which Congress also included as RICO predicate offenses in 18 U.S.C. 1961(1).

<sup>&</sup>lt;sup>7</sup> United States v. Nichols, 841 F.2d 1485, 1488 (10th Cir. 1988) (CFA "expanded the scope of property subject to forfeiture"); Caplin & Drysdale, App. at 2a (same). See Public L. No. 98-473, §§ 302, 2301, 98 Stat. 2044, 2192-93 (1984); Public L. No. 99-570, § 1365(b), 100 Stat. 3207-35 (1986).

<sup>\*</sup> As this Court recently noted, "It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand." Wheat v. United States, 56 U.S.L.W. 4441, 4444 (U.S. May 23, 1988).

ture is a possibility. Indeed, by deterring counsel from accepting many important criminal cases, fee forfeiture may inhibit the education and development of defense attorneys qualified to undertake such representation.

The ABA is deeply troubled about the effect that fee forfeiture will have on the independence of the criminal defense bar and on our adversarial system of justice. As matters now stand, defense counsel not only face conflicting ethical and professional admonitions, they also must speculate on what the final judicial position regarding fee payments in a forfeiture case will be. The ground rules for our adversarial system of justice should not be in dispute. This Court should act now to clarify issues raised in the petition.

#### II. FEE FORFEITURE RAISES SERIOUS CONSTITU-TIONAL ISSUES

A number of courts have concluded, after a review of the legislative history, that Congress did not intend the CFA to encompass bona fide attorney's fees and they have construed the statute accordingly. The ABA supports this interpretation of the statute, especially in light of the serious constitutional difficulties which would be created by a broader interpretation. The forfeiture of fees paid for representation in a criminal case would raise three constitutional issues of profound significance to an adversarial system of criminal justice.

1. The forfeiture of attorney's fees infringes upon the defendant's Sixth Amendment right to utilize his resources to retain private counsel.<sup>10</sup> The en banc majority

did not dispute the existence of a qualified right to counsel of choice, but held that "it does not apply at all in the fee forfeiture context", App. at 11a. The right was not implicated, according to the majority, because under the relation back doctrine the Government's title to forfeitable assets vests, upon conviction, on the much earlier date the assets were illegally acquired or used.

Until the defendant has been convicted, however, the Government must offer some justification sufficiently compelling to override the defendant's right to utilize his presumptively legal assets in his own defense. The other federal courts which have considered this issue have all recognized that fee restraints and forfeitures affect a defendant's right to choose counsel, thus requiring a weighing of the Government's interests against the defendant's qualified right. United States v. Monsanto, 836 F.2d 74, 82 (2d Cir. 1987), rehearing en banc granted (January 29, 1988); United States v. Thier, 801 F.2d 1463, 1466-70 (5th Cir. 1986), modified, 809 F.2d 249 (1987); United States v. Nichols, 841 F.2d 1489, 1501-05 (10th Cir. 1988). The ABA submits that, when the Government's legitimate punitive interest in forfeiture is properly weighed against the defendant's interest in choosing counsel, the defendant's constitutionally-rooted interests should prevail.

2. Fee forfeiture impairs the attorney-client relationship necessary for the effective assistance of counsel guaranteed by the Sixth Amendment. If attorney's fees are subject to forfeiture after trial, defense counsel's collection of earned fees is contingent on the outcome of the trial—a situation which raises serious ethical concerns.<sup>11</sup>

<sup>United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985);
United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985);
United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).</sup> 

<sup>&</sup>lt;sup>10</sup> A defendant should receive a "fair opportunity to secure counsel of his own choice," Powell v. Alabama, 287 U.S. 45, 53 (1932), because "the right to select and be represented by one's preferred

counsel is comprehended by the Sixth Amendment. . . ." Wheat v. United States, 56 U.S.L.W. 4441, 4443 (U.S. May 23, 1988). This right, however, is a qualified right which may be overcome in limited circumstances when the needs of the orderly administration of justice so require. See id.

<sup>11</sup> The ABA Model Rules of Professional Conduct declare: "A lawyer shall not enter into an arrangement for, charge, or collect

Further, defense counsel faces an intolerable conflict created by his pecuniary interest in the outcome of the litigation. If a verdict of forfeiture encompassing attorney's fees is rendered at trial, the statutory mechanism for relief lies in a post-trial hearing at which defense counsel bears the burden of proving his ignorance of the facts which support the forfeiture verdict. See 21 U.S.C. § 853(n) (6); 18 U.S.C. § 1963(l) (6). Thus, as the District Court below noted, "the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not fearning facts tending to inform him that his fee will be paid with the proceeds of illegal activity." App. at 9a. 12

A statutory scheme that makes a litigable issue out of the state of defense counsel's knowledge of defendant's financial affairs also risks a profound intrusion on attorney-client communications. Trial and grand jury subpoenas may be issued to defense counsel to testify regarding the amount and method of fee payments so as to demonstrate the forfeitability of the payments.<sup>13</sup> These place defense counsel in the untenable position of being a witness against his own client.<sup>14</sup> Such inquiries before, during, and after trial, which necessarily focus on counsel's knowledge of the defendant's financial activities, will chill attorney-client communications.

3. Finally, fee forfeiture raises troubling due process issues insofar as it gives the Government an ability to control the resources of the defense. The timing of an application for a pre-trial restraining order, and the invocation of the relation back doctrine are left, in the first instance, to the unfettered discretion of the prosecution. See 21 U.S.C. §§ 853(c), (e); 18 U.S.C. §§ 1963(c), (d). As a practical matter, such a restraining order will likely cause counsel to withdraw, thus vesting the prosecution with the discretionary authority to disengage the services of chosen defense counsel at any stage in the criminal proceeding.

Such power is inconsistent with the Fifth Amendment. The Due Process Clause "does speak to the balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 475 (1973). Further, the independence of defense counsel is compromised by the prospect of continued representation only by the grace of the prosecution. See United States v. Estevez, 645 F. Supp. 869, 871-72 (E.D. Wis. 1986). "There can be no fair trial unless the accused receives the services of an effective and independent advocate." Polk County v. Dodson, 454 U.S. 312, 322 (1981).

Fundamental fairness, which is guaranteed by the Fifth Amendment, see Estelle v. Williams, 425 U.S. 501, 505 (1976); Powell v. Alabama, 287 U.S. 45, 63 (1932),

<sup>. . .</sup> a contingent fee for representing a defendant in a criminal case." Model Rules of Professional Conduct Rule 1.5(d)(2). See also the predecessor Model Code of Professional Responsibility DR 2-106(C). In addition, the Rules prohibit representation of a client in a matter affecting personal financial interests. Rule 1.7(b) of Model Rules of Professional Conduct; see also Model Code of Professional Responsibility DR 5-101(A).

<sup>&</sup>lt;sup>12</sup> Defense counsel faces other conflicts of loyalty as well. For example, defense counsel will have a conflict in advising his client about a possible plea bargain that touches upon the forfeitability of the defendant's assets. See United States v. Bassett, 632 F. Supp. 1308, 1316 n.5 (D. Md. 1986), aff'd, 814 F.2d 905 (4th Cir. 1987), overruled, United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir.) (en banc); Reckmeyer, App. at 91a-92a; United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985).

<sup>&</sup>lt;sup>13</sup> On February 10, 1986, the ABA House of Delegates adopted a resolution endorsing a requirement for prior judicial review of subpoenas directed at defense counsel by the prosecution. The sup-

porting ABA Report documents the chilling effect of such subpoenas on the attorney-client relationship.

<sup>&</sup>lt;sup>14</sup> The ABA Model Rules generally forbid representation in any case in which counsel may be called as a witness. See Model Rule 3.7; Model Code DR 5-102.

demands that the defendant not be handicapped in this way in the presentation of his defense. A system which affords one party to a controversy the discretion to restrict the resources available to its opponent to contest the very allegations at issue is no longer an adversarial system within the rubric of our American tradition.

#### CONCLUSION

The constitutional and practical problems created by fee forfeiture affect a great many cases and are of sufficient substance and importance to warrant review by this Court. Accordingly, this Court should grant the petition for certiorari.

Respectfully submitted,

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Supreme Court, U.S. FILED JAN 5 1989

IN THE

JOSEPH F. SPANIOL, JR. CLERK

# Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,

Petitioner

V.

UNITED STATES OF AMERICA

#### ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

\*PETER VAN N. LOCKWOOD GRAEME W. BUSH ALBERT G. LAUBER, JR. JULIA L. PORTER ROBERT L. COHEN

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 11, 1988 CERTIORARI GRANTED NOVEMBER 7, 1988

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# UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA

### Crim. No. 85-00010-A

UNITED STATES OF AMERICA,

CHRISTOPHER F. RECKMEYER, II, et al.

#### RELEVANT DOCKET ENTRIES

1985	
Jan. 9	INDICTMENT—filed.
Jan. 25	NOTICE of receipt of funds from the deft.—filed.
Mar. 7	NOTICE returnable 3-15-85 together with MOTION for an order modifying restraining order of 1-14-85 and excluding attorney fees and costs from forfeiture with MEMO in support of same—filed by Christopher F. Reckmeyer.
Mar. 15	OPPOSITION to defense counsel's motion for modification of restraining order—filed by U.S.
Mar. 15	ORDER denying deft. Motion for a modifi- cation of restraining order. Entered and filed. Copies sent. (AVB).
Mar. 22	RESTRAINING ORDER of 1-14-85 unsealed by AVB filed.
May 17	CONSENT Decree for forfeiture and OR- DER-filed.

- June 17 CLAIM of interest in forfeited property and petition for hearing to adjudicate validity of claimed interest—filed by Caplin & Drysdale.
- Oct. 18 CONSOLIDATED response to petitions for relief from forfeiture—filed by U.S.
- Oct. 22 TRIAL PROCEEDINGS (J. Cacheris) Reporter: Farmer—Appearances of counsel. Response to be filed in 10 days. Arguments to be heard on 11-8-85.
- Nov. 5 MEMO. in support of claim of interest in forfeited property and petition for hearing to adjudicate validity of claimed interest—filed by Caplin & Drysdale, Chartered.
- Nov. 8 TRIAL PROCEEDINGS (J. Cacheris) Reporter: Farmer. This matter came on for arguments in re; forfeiture—arguments heard—taken under advisement. 1986
- Mar. 27

  ORDER and MEMORANDUM OPINION that the Orders of Forfeiture of 3-14-85, 5-17-85 and 6-5-85 are amended to reflect that the firm of Caplin & Drysdale has a legal right, title, and interest in the sum of \$170,512.99 out of the forfeited assets of Christopher Reckmeyer. Entered and filed. Copies sent. (JCC).
- Mar. 27 CONSOLIDATED reply to petitioners' Memoranda on forfeiture—filed by U.S. on 11-7-85.
- Mar. 28 NOTICE of appeal of Order of 3-27-86—filed by U.S. Copy of notice mailed to petitioners counsel. Copy of notice, order and docket entries mailed to U.S.C.A.
- June 5 TRANSCRIPT of proceedings on 11-8-85—filed.

- July 17 TRANSCRIPT of proceedings on 3-15-85 filed.
- July 18 RECORD on appeal in 3 volumes mailed to U.S.C.A.
  VOL. I-Pleadings (1-13).
  VOL. II-Trans. of proc. on 11-8-85.

VOL. III-Trans. of proc. on 3-15-85.

# UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## No. 86-5050

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

V.

CAPLIN & DRYSDALE, Chartered,

Claimant-Appellee;

and

CHRISTOPHER F. RECKMEYER, II and ROBERT BRUCE RECKMEYER,

Defendants.

# RELEVANT DOCKET ENTRIES

5/2/86	CRIMINAL case docketed. Fee status at case opening was us. (dsh) [86-5050]
5/8/86	DOCKETING NOTICE issued. (dsh) [86-5050]
5/15/86	DISCLOSURE statement filed by Appellee Caplin & Drysdale (n). (dsh) [86-5050]
5/15/86	COUNSEL of record form filed by Kent S. Robinson for Appellant U.S. (dsh) [86-5050]
5/20/86	COUNSEL of record form filed by Peter Van Norden Lockwood for Appellee Caplin & Drysdale, (dsh) [86-5050]
7/21/86	RECORD on appeal filed. (Pleadings: I T/S: II. JII). (dsh) [86-5050]
7/25/86	CASE calendared for oral argument. (ski) [Entry date 8/19/86]. [86-5025 86-5050 86-5069]

8/20/86	MOTION filed by Appellant Leon Durwood Harvey in 86-5025 for additional argument time of 20 minutes [25176-1]. (dsh) [86-5025 86-5050 86-5069]
8/20/86	SUBMITTED to JDP, SJE, RFC, motion for additional argument time [25176-1] in 86-5025, 86-5050, 86-5069. (dsh) [86-5025 86-5050 86-5069] (dsh)
8/25/86	MOTION filed by American Bar Association to file amicus brief [25792-1]. (dsh) [86-5025 86-5050 86-5069]
8/25/86	MOTION filed by National Legal Aid and Defender Association to file amicus brief [25796-1]. (dsh) [86-5025 86-5050 86-5069]
8/25/86	SUBMITTED to JDP, SJE, RFC, motion to file amicus brief [25792-1] in 86-5025, 86-5050, 86-5069, motion to file amicus brief [25796-1] in 86-5025, 86-5050, 86-5069. (dsh) [86-5025 86-5050 86-5069]
8/26/86	SUBMITTED to panel, amicus curiae briefs conditionally submitted by American Bar As- sociation and National Legal Aid & Defender Association. (dsh) [86-5025 86-5050 86-5069]
8/26/86	BRIEF filed by Appellee in 86-5050, Appellee in 86-5069. Type of Service: HD, Copies: 12. (w/reply brief for Harvey in 86-5025). (sec) [Entry date 8/27/86] [86-5025 86-5050 86-5069]
8/29/86	MOTION for consent to file amicus brief on behalf of National Association of Criminal Defense Lawyers (NACDL) filed. (dsh) [86- 5050 86-5069]
8/29/86	MOTION filed by New York Criminal Bar Association to file amicus brief [26555-1].

(dsh) [86-5025 86-5050 86-5069]

0100100	MOTION filed by National Association of
8/29/86	Criminal Defense Lawyers (NACDL) and Maryland Criminal Defense Attorneys' Association (MCDAA) to f amicus brief [26556-1], (dsh) [86-5025 86-5050 86-5069]
8/29/86	CLERK order filed denying motion for additional argument time [25176-1] in 86-5025, 86-5050, 86-5069. Copies to attorney for Appellant in 86-5025, attorney for Appellee in 86-5025, attorney for Appellee in 86-5050, attorney for Appellant in 86-5050, attorney for Appellee in 86-5069, attorney for Appellant in 86-5069, attorney for Appellant in 86-5069. (dsh) [86-5025 86-5050 86-5069]
8/29/86	CLERK order filed granting motion to file amicus brief [25796-1] in 86-5025, 86-5050, 86-5069. Copies to all parties. (dsh) [86-5025 86-5050 86-5069]
8/29/86	CLERK order filed granting motion to file amicus brief [25792-1] in 86-5025, 86-5050, 86-5069. Copies to all parties. (dsh) [86-5025 86-5050 86-5069]
8/29/86	MOTION filed by Appellee US in 86-5025, Appellant US in 86-5050, Appellant US in 86-5069 to file oversize brief of 44 pages [26851-1]. (dsh) [Entry date 9/2/86] [86-5025 86-5050 86-5069]
8/29/86	SUBMITTED to JDP, SJE, RFC, motion to file oversize brief [26851-1] in 86-5025, 86-5050, 86-5069. Chapman's copy was not mailed to him will be hand-delivered by WTC at argument. (dsh) [Entry date 9/2/86] [86-5025 86-5050 86-5069]
9/4/86	ORAL argument heard. Courtroom Deputy: wtc (dsh) [Entry date 9/29/86] [86-5025 86-5050 86-5069]

9/5/86 REPLY brief filed by Appellant in 86-5050, Appellant in 86-5069. Type of Service: G, Copies: 12. (sec) [Entry date 9/10/86] [86-5025 86-5050 86-50691 10/31/86 MOTION filed by Appellant Leon Durwood Harvey in 86-5025, Appellee Caplin & Drysdale in 86-5050, Appellee Clarence Meredith in 86-5069, Appellee Ronald Burnell Bassett in 86-5069 to file supplemental brief [37452-1]. [86-5025, 86-5050, 86-5069] (dsh) [86-5025 86-5050 86-50691 10/31/86 SUBMITTED to JDP, SJE, RFC, motion to file supplemental brief [37452-1] filed by Appellee Ronald Burnell Bassett, Clarence Meredith, Caplin & Drysdale, Appellant Leon Durwood Harvey in 86-5025, 86-5050, 86-5069 and add'l documents: condit. submitted supp. brief. (dsh) [86-5025 86-5050 86-5069] 11/6/86 COURT order filed by JDP, SJE, RFC granting motion to file supplemental brief

granting motion to file supplemental brief [37452-1] filed by Appellee Ronald Burnell Bassett, Clarence Meredith, Caplin & Drysdale, Appellant Leon Durwood Harvey in 86-5025, 86-5050, 86-5069. Copies to all counsel. [86-5025, 86-5050, 86-5069] (dsh) [86-5025 86-5050 86-5069]

SUPPLEMENTAL brief filed by Amicus Curiae in 86-5025, Appellant in 86-5050 Appellant in 86-5069. type of Service: G, copies of brief: 12. (eac) [Entry date 11/7/86] [86-5025 86-5050 86-5069]

11/17/86	SUPPLEMENTAL brief filed by Appellee Caplin & Drysdale in 86-5050, Appellee Clarence Meredith in 86-5069, Appellant Leon Durwood Harvey in 86-5025 in response to supplemental brief of the United States. Type of Service: mail copies: 12 (dsh) [Entry date 11/24/86] [86-5025 86-5050 86-5069]
3/6/87	AUTHORED opinion (P) filed. Panel: JDP, SJE, RFC; Decision: affirmed. [86-5025, 86-5050, 86-5069] (dsh) [86-5025 86-5050 86-5069]
3/6/87	JUDGMENT order filed. (su) [Entry date 3/8/87] [86-5050]
3/18/87	PETITION filed by Appellant US to extend time to file petition for rehearing [65482-1]. [86-5050] (dsh) [86-5050]
3/18/87	CLERK order filed granting motion to extend time to file pet. reh. [65482-1] filed by Appellant US. Copies to Peter Van Norden Lockwood for Appellee Caplin & Drysdale, Kent S. Robinson for Appellant US. [86-5050] (dsh) [86-5050]
4/20/87	PETITION filed by Appellant US for rehearing [74729-1], for suggestion for rehearing en banc [74729-2]. [86-5050] (dsh) [Entry date 4/24/87] [86-5050]
4/23/87	RESPONSE to US petition for rehearing and suggestion for rehearing en banc requested of Appellee Caplin & Drysdale on or before 05/03/87. [86-5050] (dsh) [Entry date 4/24/87] [86-5050]
5/4/87	RESPONSE [77663-1] to motion for suggestion for reh. en banc [74729-2], motion for rehearing [74729-1] filed by Appellee Caplin & Drysdale. [86-5050] (dsh) [Entry date 5/6/87] [86-5050]

6/11/87	COURT order filed by En Banc court granting motion for rehearing en banc [74729-2], granting motion for rehearing (copies to all parties) 86-5050. (dsh)
6/11/87	CASE reopened. [86-5050] (sgp) [Entry date 2/23/88] [86-5050]
7/14/87	CASE tentatively calendared for oral argument. Term: October, Place: Richmond. [86-5050] (ski) [86-5050]
8/12/87	CASE calendared for oral argument. [86-5050] (ski) [86-5050]
8/12/87	Motion filed by National Association of Criminal Defense Lawyers to participate in oral argument [166542-1]. [86-5050] (dsh) [86-5050]
10/6/87	ORAL argument heard. Courtroom Deputy: WTC. [86-5050] (wtc) [86-5050]
12/7/87	SUPPLEMENTAL authorities (FRAP 28(j)) filed by Appellee [423345-1] [86-5050] (dad) [Entry date 12/8/87] [86-5050]
12/30/87	SUPPLEMENTAL authorities (FRAP 28(j)) filed by Appellant [469873-1] [86-5050] (dad) [86-5050]
1/11/88	AUTHORED opinion (P) filed. Panel: JHW, Writing Judge, DSR, KKH, HEW, Concurring Judge, FDM, Concurring Judge, RFC, WWW, JDP, Dissenting Judge; HLW, Dissenting Judge; JMS, Dissenting Judge; SJE, Dissenting Judge; Decision: reversed. [86-5050] (dsh) [Edit date 1/11/88] [86-5050]
/11/88	JUDGMENT order filed. [86-5050] (dsh) [86-5050]
/1/88	MANDATE issued. [86-5050] (emb) [86-5050]

2/1/88	RECORD on appeal returned to USDC at EDVA-Alexandria. (Pleadings: Volume I T/S: Volumes II-III). [86-5050] (emb) [86-5050]
3/7/88	FEDERAL Reporter Citation: 837 F.2d 637. [86-5050] (elf) [Entry date 3/16/88]. [86-5050]
4/26/88	SUPREME Court notice received of filing of petition for certiorari on 04/11/88. Supreme Court No. 87-1729. [86-5050] (cw) [Entry date 5/16/88] [86-5050]

#### IN THE UNITED STATES DISTRICT COURT FOR THE-EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-00010-A

UNITED STATES OF AMERICA v.

CHRISTOPHER FREDERICK RECKMEYER, II
a/k/a "The Boss"
a/k/a "The Rug Man"
a/k/a "Big Brother"

ROBERT BRUCE RECKMEYER
a/k/a "Little Brother"
a/k/a "Robo"
a/k/a "Blondie"

BRUCE WAYNE THOMASON a/k/a "Loose Bruce" a/k/a "Troy Clayton" PATRICIA L. RECKMEYER et al.

#### UNDER SEAL ORDER

This matter having come before the Court on an Ex Parte Motion of the United States of America for a retraining order pursuant to Title 21, United States Code, Section 848(d) and the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Section 413, which provide for jurisdiction to enter restraining orders and take such other actions as the Court shall deem necessary in connection with any property or other interest subject to forfeiture pursuant to Title 21, United States Code, Section 848(a);

The Court finds that if the Government were required to give notice of this action to the interested parties, said

parties, their agents, servants, employees, attorneys and those in active concert or participation with them, might place certain property beyond the jurisdiction of this Court or otherwise detrimentally affect the Government's interest in such property, thereby frus trating the ends of justice and causing irreparable harm to the United States by defeating the jurisdiction of this Court over such property.

This Court further finds that, if this Court fails to enter this Order as prayed for by the United States, that

CHRISTOPHER FREDERICK RECKMEYER, II a/k/a "The Boss" a/k/a "The Rug Man" a/k/a "Big Brother" ROBERT BRUCE RECKMEYER a/k/a "Little Brother" a/k/a "Robo" a/k/a "Blondie" GREGORY ALAN JARRETT a/k/a "Scott" a/k/a "Wild Man" STEPHEN KING WORTH a/k/a "Patrick Nelson Pine" a/k/a "Patrick Bartley" a/k/a "Hippy Steve" BRUCE WAYNE THOMASON a/k/a "Loose Bruce" a/k/a "Troy Clayton" THOMAS L. TUCKER a/k/a "Thomas E. Hawkins" PATRICK RYON HENDRY LEON D. HARVEY a/k/a "Smiles" PATRICIA L. RECKMEYER

JAMES SAMUEL ADAMS

DOUGLAS CRAIG COCHRAN DAVID WINDSOR COOK CHARLES ARTHUR FRIEND, III a/k/a "Carlos" TIMOTHY PATRICK RUDDY a/k/a "Douglas Paul Harrison" a/k/a "Richard Dale Ar.drews" ANDREW JAMES MEYERS a/k/a "Carl" JOHN CHRISTOPHER ROBINSON a/k/a "Chris Robertson" WILLIAM HARRIS SHARPE a/k/a "John Raymond Pavlovic" a/k/a "William Schaffer" a/k/a "William Stewart Sharpe" a/k/a "William Simpson" a/k/a "J. R. Shaffer" a/k/a "William Harris" CHARLES ANTHONY SWEENEY a/k/a "David Eugene Reich" a/k/a "Tony" THOMAS WALLACE ASHTON SALVATORE F. VASTOLA a/k/a "Sal" CRAIG DOUGLAS SMITH a/k/a "Donald Fisher" a/k/a "Smitty" STEPHEN SCOTT JOHNSON a/k/a "Joseph Scott Henderson" a/k/a "Dan Bowen" RICHARD FRANCIS VAUGHN DONALD SHIRACK a/k/a "Don Shipley" a/k/a "Danial Shipley"

FRANCOISE NASTA a/k/a "Frankie" JAN RICHARD GILLIE

William J. Reckmeyer, Sr.

Elizabeth A. Reckmeyer

Nancy L. Reckmeyer

Marionlee Thomason

Charles E. Lane

Jean E. Lane

Richard K. Swensen

Kristen E. Swensen

Michael J. Kapper

Carol Thomason Hile

William Pruzan

Pnina Pruzan

Mark B. Newman

Joanna V. Newman

Brett C. Leavenworth

Kevin Goeller

Patricia L. Goeller

Ross W. Thomason

Lorraine Thomason

Franklin Life Insurance Company

Sovran Bank

Bank of New York

Merrill, Lynch, Pierce, Fenner & Smith, Inc.

First Virginia Bank

Dominion National Bank of Virginia

Riggs National Bank

The Calvert Group First Variable Rate Fund Crancy's, Inc.

Organic Foods, Inc.

Unlimited Investments, Inc.

B.C.P., Inc.

United Trade, Inc.

Atlantis Stone Corporation

American Deli, Inc.

Mainland Carpets, Inc.

and their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, might place certain property beyond the jurisdiction of this Court or otherwise detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating the jurisdiction of this Court over such property. Accordingly, it is hereby:

ORDERED, ADJUDGED, and DECREED that,

CHRISTOPHER FREDERICK RECKMEYER, II

a/k/a "The Boss"

a/k/a "The Rug Man"

a/k/a "Big Brother"

ROBERT BRUCE RECKMEYER

a/k/a "Little Brother"

a/k/a "Robo"

a/k/a "Blondie"

GREGORY ALAN JARRETT

a/k/a "Scott"

a/k/a "Wild Man"

STEPHEN KING WORTH

a/k/a "Patrick Nelson Pine"

a/k/a "Patrick Bartley"

a/k/a "Hippy Steve"

BRUCE WAYNE THOMASON a/k/a "Loose Bruce" a/k/a "Troy Clayton" THOMAS L. TUCKER a/k/a "Thomas E. Hawkins" PATRICK RYON HENDRY LEON D. HARVEY a/k/a "Smiles" PATRICIA L. RECKMEYER JAMES SAMUEL ADAMS DOUGLAS CRAIG COCHRAN DAVID WINDSOR COOK CHARLES ARTHUR FRIEND, III a/k/a "Carlos" TIMOTHY PATRICK RUDDY a/k/a "Douglas Paul Harrison" a/k/a "Richard Dale Andrews" ANDREW JAMES MEYERS a/k/a "Carl" JOHN CHRISTOPHER ROBINSON a/k/a "Chris Robertson" WILLIAM HARRIS SHARPE a/k/a "John Raymond Pavlovic" a/k/a "William Schaffer" a/k/a "William Stewart Sharpe" a/k/a "William Simpson" a/k/a "J. R. Shaffer" a/k/a "William Harris" CHARLES ANTHONY SWEENEY a/k/a "David Eugene Reich" a/k/a "Tony" THOMAS WALLACE ASHTON SALVATORE F. VASTOLA a/k/a "Sal"

CRAIG DOUGLAS SMITH a/k/a "Donald Fisher" a/k/a "Smitty" STEPHEN SCOTT JOHNSON a/k/a "Joseph Scott Henderson" a/k/a "Dan Bowen" RICHARD FRANCIS VAUGHN DONALD SHIRACK a/k/a "Don Shipley" a/k/a "Daniel Shipley" FRANCOISE NASTA a/k/a "Frankie" JAN RICHARD GILLIE William J. Reckmeyer, Sr. Elizabeth A. Reckmeyer Nancy L. Reckmeyer Marionlee Thomason Charles E. Lane Jean E. Lane Richard K. Swensen Kristen E. Swensen Michael J. Kapper Carol Thomason Hile William Pruzan Pnina Pruzan Mark B. Newman Joanna V. Newman Brett C. Leavenworth Kevin Goeller

Patricia L. Goeller

Ross W. Thomason

Lorraine Thomason

Franklin Life Insurance Company

Sovran Bank

Bank of New York

Merrill, Lynch, Pierce, Fenner & Smith, Inc.

First Virginia Bank

Dominion National Bank of Virginia

Riggs National Bank

The Calvert Group First Variable Rate Fund

Crancy's, Inc.

Organic Foods, Inc.

Unlimited Investments, Inc.

B.C.P., Inc.

United Trade, Inc.

Atlantis Stone Corporation

American Deli, Inc.

Mainland Carpets, Inc.

and their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby,

ORDERED, PROHIBITED and ENJOINED from selling, assigning, pledging, distributing, encumbering, or otherwise disposing of, or removing from the jurisdiction of this Court or removing from any checking or savings account, or safe deposit box, all or any part of their interest, direct or indirect, in the following described property:

 Condominium Unit Number M-48 in Estate Questa Verde, lying and being in Estate Hermon Hill, Company Quarter, Christianstead, St. Criox, U.S. Virgin Islands, together with 1.22366 percent individual interest in the common areas and facilities so declared in the Declaration of Condominium to be appurtenant to the above-described condominium unit; and all rental and lease income from condominium Unit Number M-48.

- 2. A parcel of land containing 675.49 acres, more or less, with all improvements, structures, livestock, machinery and appurtenances thereto, known as the "Shelburne Glebe" located on the southeast side of Road No. 729 approximately 4.5 miles southwest of Leesburg, in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 769 beginning at page 03 in the land records of Loudoun County, Virginia.
- 3. A parcel of land containing 50.19 acres with all improvements, structures, machinery, livestock and appurtenances thereto, located on the northwest side of Road No. 797 approximately 4.5 miles southwest of Leesburg, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 788 beginning at page 759 in the land records of Loudoun County, Virginia.
- 4. A parcel of land containing 10.0 acres, with all improvements, structures, machinery, live stock and appurtenances thereto, located on the northwest side of Road No. 797, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in Schedule A of the deed recorded in Deed Book 795 beginning at page 45 in the land records of Loudoun County, Virginia.
- 5. A parcel of land containing 146.2785 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located ap-

proximately three miles south of Hamilton, Blue Ridge Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 805 beginning at page 336 in the land records of Loudoun County, Virginia and in a subsequent recording, as evidenced by the transfer of title to William J. Reckmeyer, Sr., father of CHRIS RECKMEYER, as recorded by deed in Deed Book 836 beginning at page 184 in the land records of Loudoun County, Virginia.

- 6. A parcel of land containing 38.961 acres, with all improvements, structures, machinery, live stock and appurtenances thereto, located near Mt. Gilead in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described by a plat and survey of J. Horace Jarrett, C.L.S., dated August 17, 1982, a copy of which is attached to the deed recorded in Deed Book 819 beginning at page 860 in the land records of Loudoun County, Virginia.
- 7. A parcel of land containing 32.632 acres, with all improvements, structures, machinery, live stock and appurtenances thereto, located near the northwest side of Franklin Gibson Road in the Eighth Election District of Anne Arundel County, Maryland and more particularly described in a legal description attached to the deed recorded in Deed Book 3466 beginning at page 253 among the land records of Anne Arundel County, Maryland and in a subsequent recording, as evidenced by the transfer of title to Jim Adams, brother-in-law of ROBERT RECKMEYER, as recorded in Deed Book 3466 beginning at page 253 in the land records of Anne Arundel County, Maryland.
- 8. Any and all precious metals owned by or held on behalf of CHRIS RECKMEYER, ROB-

ERT RECKMEYER and/or BRUCE THOMA-SON and the business entities which they each control and/or in which they hold any interest, including but not limited to: gold and silver bullion and coins, Baht gold jewelry, gold Canadian maple leaf coins, gold Krugerrand coins, gold and silver chains, and gold and silver bracelets.

- 9. Any and all precious gemstones owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOM-ASON and the business entities which they each control and/or in which they hold any interest, including but not limited to: golden sapphires, Burma rubies, Thailand rubies, emeralds, tanzanites, pink sapphires, diamonds and pearls.
- 10. Any and all oriental carpets and/or rugs, silk tapestries and/or rugs, furniture, chests, antiques, and lamps owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest.
- 11. A deposit of \$2,500 held in escrow by Wellborn County Properties, Inc. for the purchase of 44.62 acres of land, including all improvements, located in Loudoun County, Virginia.
- 12. A January 6, 1984 promissory note payable to CHRIS RECKMEYER and Nancy Reckmeyer by William John Reckmeyer, Sr. in the amount of \$112,500 plus accrued interest.
- All accounts receivable of CHRIS RECK-MEYER payable by Michael J. Kapper.
- 14. Eight oriental carpets totalling 162 square feet belonging to CHRIS RECKMEYER and held

on consignment by Brett C. Leavenworth in Tucson, Arizona.

- 15. Any and all stock, assets and inventory of Unlimited Investments, Inc., a corporation in the State of Virginia, including but not limited to, all accounts at any financial institutions, typewriters, scales, file cabinets, safes and oval carpet.
- 16. Any and all of the shareholder and ownership interest of CHRIS RECKMEYER and Nancy L. Reckmeyer in B.C.P., Inc., a corporation in the State of California.
- 17. Any and all stock, financial, or other ownership interest of CHRIS RECKMEYER in American Deli, Inc., a corporation in the State of Florida.
- 18. A November 1983 promissory note in the amount of \$5,000 plus accrued interest payable to CHRIS RECKMEYER by Mark B. Newman, President of the American Deli, Inc.
- 19. Any and all scock, assets and inventory of Crancy's Inc., a corporation in the State of Virginia.
- 20. Any and all stock, assets and inventory of Organic Foods, Inc., a corporation in the State of Virginia.
- 21. Any and all stock, assets and inventory of Manpower Management, Inc., a corporation in the State of Virginia.
- 22. Any and all stock, assets and inventory of United Trade, Inc., a corporation in the State of Maryland, also doing business as "East West Design" in the State of Virginia.
- 23. Any and all stock, assets and inventory of Robert Bruce Products.

- 24. Any and all stock, assets and inventory of Atlantis Stone Corporation, a corporation in the State of Delaware.
- 25. Any and all stock, assets and inventory of Mainland Carpets, Inc., a corporation in the State of Virginia.
- 26. Any and all possessions of CHRIS RECK-MEYER, ROBERT RECKMEYER and/or BRUCE THOMASON with a retail value of \$1,000 or more, including but not limited to, [currency], furniture, musical instruments, appliances, carpets, electronic devices, art objects, and antiques; including but not limited to such possessions located at the "Shelburne Glebe" in Loudoun County, Virginia and at 12900 Westbrook Drive, in Centreville, Virginia.
- 27. A 1973 Mercedes-Benz four door sedan, vehicle identification number 11406012004068.
- 28. A 1974 Chevrolet two door coupe, vehicle identification number 1L57H4Y126501.
- 29. A 1976 Chrysler four door sedan, vehicle identification number CM41N6D164365.
- 30. A 1979 Ford Pickup Truck, vehicle identification number F26HEEJ3709.
- 31. A 1978 Chevrolet four door station wagon, vehicle identification number CCL168F203822.
- 32. A 1974 Cadillac four door sedan, vehicle identification number 6B69R4Q172668.
- 33. A 1979 Chevrolet station wagon, vehicle identification number CCS269F109212.
- 34. A 1984 Chevrolet station wagon, vehicle identification number 1G8GC26M5EF107085.

- 35. A 1976 Cadillac four door sedan, vehicle identification number 6B69S6Q215574.
- 36. A 1984 Chevrolet station wagon, vehicle identification number 1G3GK26M4EF107548.
- 37. A 1984 Mercedes Benz four door sedan, vehicle identification number WDBAB33A4EA 038061.
- 38. A 1959 Mercedes Benz four door sedan, vehicle identification number 220S8513087.
- 39. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOM-ASON in monies deposited by or on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON, and/or their corporations, to any and all personal and corporate pension plans, money purchase plans, keogh plans, individual retirement accounts, annuity contracts or any other retirement or profit sharing funds including, but not limited to, the following:
  - a. Keogh Annuity Contracts numbers 4278206 and 4278207, each in the amount of \$7,500, and any accrued interest, in the names of CHRIS RECKMEYER and Nancy Reckmeyer issued by the Franklin Life Insurance Company of Springfield, Illinois;
  - Sovran Bank account number 9381-2959 in the name of Crancy's, Inc. Money Purchase and Retirement Trust;
  - Sovran Bank account number 9381-2946 in the name of Crancy's, Inc., Profit Sharing and Retirement Trust;

- d. Bank of New York account number S 063795054246 as agent for Merrill Lynch account number 795-05424 in the name of Unlimited Investments, Inc., Money Purchase Plan;
- e. Bank of New York account number S 063795054253 as agent for Merrill Lynch account number 795-05425 in the name of Unlimited Investments, Inc., Profit Sharing Plan;
- f. Calvert Group First Variable Rate Fund account number 113-061-6 in the name of United Trade, Inc., Profit Sharing Plan;
- g. Calvert Group First Variable Rate Fund account number 113062-4 in the name of United Trade, Inc. Money Purchase Plan;
- 40. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOM-ASON in any monies deposited by or on behalf of CHRIS RECKMEYER, ROBERT RECK-MEYER or BRUCE THOMASON, and/or their corporations, in any safe deposit boxes and in any and all personal checking accounts, corporate checking accounts, savings accounts and any other accounts including, but not limited to, the following:
  - a. First Virginia Bank account number 8513-4120 in the name of CHRIS RECKMEYER and Nancy Reckmeyer;
  - First Virginia Bank account number 0716-1433 in the name of Crancy's, Inc.;
  - c. First Virginia Bank account number 0530-6728 in the name of Mainland Carpets, Inc.;

- d. First Virginia Bank account number 8846-0312 in the name of BRUCE THOMASON and Marionlee Thomason;
- e. First American Bank of Virginia account number 0624-4912 in the name of Unlimited Investments, Inc.;
- f. First American Bank of Virginia account number 0649-9198 in the name of Manpower Management, Inc.;
- g. Dominion National Bank of Virginia account number 4-250-280-1 in the name of Organic Foods, Inc.;
- Riggs National Bank account number 08-392-168 in the name of Atlantis Stone Corporation;
- i. Calvert Group First Variable Rate Fund account number 143-404-2-101 in the name of Atlantis Stone Corporation;
- j. Calvert Group First Variable Rate Fund account number 001-001132786 in the name of ROBERT RECKMEYER;
- k. Calvert Group First Variable Rate Fund account number 89251-3 in the name of United Trade, Inc.
- 41. Approximately \$195,180.16, derived from the 1983 sale by ROBERT RECKMEYER and PATRICIA RECKMEYER of a parcel of real property and all appurtenances thereto, said property being known as "Gibraltar Farm" and containing approximately 176 acres located in Fauquier County, Virginia; all proceeds from the 1983 sale of said property and all accrued interest on the aforesaid \$195,180.16 since its November 15, 1983 seizure by the United States of America.

IT IS HEREBY ORDERED that this Order shall be served forth with upon all parties named above and shall remain in effect until such time as the Government's rights to said property can be fully determined at a trial of this case on the merits and until the conclusion of all appeals taken by the Government and/or CHRISTOPHER F. RECKMEYER, II, ROBERT BRUCE RECKMEYER or BRUCE WAYNE THOMASON.

#### UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: 1/14/85 at 3:37 p.m.

I Ask For This:

By: /s/

Karen P. Tandy Assistant United States Attorney

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

UNITED STATES OF AMERICA	}						
v	CRIMINAL NO.						
CHRISTOPHER FREDERICK RECKMEYER a/k/a "The Boss"	) Count 1: 21 USC 846						
a/k/a "The Rug Man"	) Count 2: 21 USC 848						
a/k/a "Big Brother" (Counts 1, 2, 7, 10, 12, 22, 24, 25, 26, 27, 28, 29, 30, 31)	) Count 3: 21 USC 841(a)(1) 18 USC 2						
ROBERT BRUCE RECKMEYER a/k/a "Little Brother"	) Count 4: 21 USC 841(a)(1) 18 USC 2						
a/k/a "Robo" a/k/a "Blondie" (Counts 1, 2, 3, 4, 5, 6, 8, 9	) Count 5: 21 USC 841(a)(1) 18 USC 2						
13, 14, 15, 16, 17, 18, 19, 20, 23, 39, 40, 41, 42, 43, 47, 48)	) Count 6: 21 USC 841(a)(1) 18 USC 2						
GREGORY ALAN JARRETT a/k/a "Scott" a/k/a "Wild Man"	) Count 7: 21 USC 841(a)(1) 18 USC 2						
(Counts 1, 13, 14, 15, 16, 17)	) Count 8: 21 USC 841(a)(1) 18 USC 2						
STEPHEN KING WORTH a/k/a "Patrick Nelson Pine" a/k/a "Patrick Bartley"	) Count 9: 21 USC 841(a)(1)						
a/k/a "Hippy Steve" (Counts 1, 32, 33)	18 USC 2						
BRUCE WAYNE THOMASON	) Count 10: 21 USC 841(a)(1) ) 18 USC 2						
a/k/a "Loose Bruce" a/k/a "Troy Clayton" (Counts 1, 2, 11, 12, 21, 44,	) Count 11: 21 USC 841(a)(1) 18 USC 2						
45, 46 THOMAS L. TUCKER	) Count 12: 21 USC 841(a)(1) ) 18 USC 2						
a/k/a "Thomas E. Hawkins" (Counts 1, 7)	) Count 13: 18 USC 371						
PATRICK RYON HENDRY (Count 1)	) Count 14: 26 USC 5861(d) & 5871						
LEON D. HARVEY	) Count 15: 26 USC 5861(d) & 5871						
a/k/a "Smiles" (Counts 1, 8)	) Count 16: 26 USC 5861(e) & 5871						
(Counts 1, 6)	) Count 17: 26 USC 5861(e) & 5871						

PATRICIA L. RECKMEYER (Counts 1, 34, 35, 36, 37, 38)	) Count	18:	18	USC	922(a)(5)
JAMES SAMUEL ADAMS	Count	19:	18	USC	922(a)(5)
(Count 1)	Count	20:			5316 103.23(a)
DOUGLAS CRAIG COCHRAN (Counts 1, 12)	)		31	CFR	103.25(b) 103.49
DAVID WINDSOR COOK (Count 1)	)				1014
CHARLES ARTHUR FRIEND, III a/k/a "Carlos"	) Count )	22:	18 18	USC	1952(a)(3 2
(Counts 1, 16) TIMOTHY PATRICK RUDDY	) Count	23:		USC USC	1952(a)(3 2
a/k/a "Douglas Paul Harrison" a/k/a "Richard Dale Andrews" (Counts 1, 12)	) Count )	24:		USC USC	7206(1) 2
ANDREW JAMES MEYERS a/k/a "Carl"	) Count	25:	26 18	USC USC	7206(1) 2
(Counts 1, 12, 13)	Count	26:	26 18	USC USC	7206(2)
JOHN CHRISTOPHER ROBINSON a/k/a "Chris Robertson" (Counts 1, 3)	Count	27:	26		7206(1)
WILLIAM HARRIS SHARPE a/k/a "John Raymond Pavlovic" a/k/a "William Schaffer"	Count	28:	26		7206(1)
a/k/a "William Stewart Sharpe" a/k/a "William Simpson"	Count	29:	26	USC	7206(2)
a/k/a "J.R. Shaffer" a/k/a "William Harris"	)				7206(1)
(Counts 1, 10)	Count	31:	26	USC	7206(1)
CHARLES ANTHONY SWEENEY a/k/a "David Eugene Reich" a/k/a "Tony"	Count	32:		USC USC	7206(1) 2
(Count 1) THOMAS WALLACE ASHTON	Count	33:		USC USC	7206(1) 2
(Counts 1, 3)	Count	34:		USC USC	7206(1) 2
SALVATORE F. VASTOLA  a/k/a "Sal"  (Count 1)	Count		26		7206(1)

	)			-	
CRAIG DOUGLAS SMITH a/k/a "Donald Fisher" a/k/a "Smitty"	) Count	36:	26 18	USC USC	7206(1) 2
(Count 1)	) Count	37:	26 18	USC USC	7206(1) 2
STEPHEN SCOTT JOHNSON a/k/a "Joseph Scott Henderson" a/k/a "Dan Bowen"	) Count	38:	26 18	USC	7206(1) 2
(Counts 1, 13)	) Count	39:	26	USC	7206(1)
RICHARD FRANCIS VAUGHN (Count 1)	) Count	40:	26	USC	7206(1)
	) Count	41:	26	USC	7206(1)
DONALD SHIRACK a/k/a "Don Shipley" a/k/a "Danial Shipley"	Count	42:	26	USC	7206(2)
(Count 1)	Count	43:	26	USC	7206(1)
FRANCOISE NASTA a/k/a "Frankie" (Count 1)	) Count	44:	26 18	USC	7206(1) 2
JAN RICHARD GILLIE (Count 1)	) Count	45:		USC	7206(1) 2
	Count	46:	26	USC	7206(1) 2
	) Count	47	: 18	USC	1503
	) Count	48	: 18	USC	1622

#### INTRODUCTION

At all times material to this Indictment:

- 1. CHRISTOPHER F. RECKMEYER (hereinafter referred to as "CHRIS RECKMEYER") was the owner of Crancy's, a sole proprietorship.
- CHRIS RECKMEYER was the president of Crancy's, Inc., a corporation.
- CHRIS RECKMEYER was the president of Organic Foods, Inc., a corporation.
- CHRIS RECKMEYER was the only salesman of Unlimited Investments, Inc., a corporation.
- CHRIS RECKMEYER was the co-owner of BCP, Inc., a corporation.
- 6. ROBERT BRUCE RECKMEYER (hereinafter referred to as "ROBERT RECKMEYER") was the president of United Trade, Inc., a corporation which also uses the name of "East West Design".
- ROBERT RECKMEYER was the owner of Robert Bruce Products, a sole proprietorship.
- ROBERT RECKMEYER was the president of Atlantis Stone Corporation, a corporation.
- PATRICK RYON HENDRY (hereinafter referred to as "PAT HENDRY") was the President of Patrick R. Hendry, Inc., a corporation.
- PAT HENDRY was the president of The Royal Stone Corporation, a corporation.
- BRUCE WAYNE THOMASON (hereinafter referred to as "BRUCE THOMASON") was the owner of Mainland Carpets, a sole proprietorship.
- BRUCE THOMASON was the president of Mainland Carpets, Inc., a corporation.

- 13. ROBERT GOVERN was the president of G & M Investment Enterprises, Inc., a corporation.
- 14. STEPHEN KING WORTH (hereinafter referred to as "STEVE WORTH") was the owner of S & M Products, a sole proprietorship.
- 15. JAMES SAMUEL ADAMS (hereinafter referred to as "JIM ADAMS") was the owner of Eastern Investments, a sole proprietorship.
- JIM ADAMS was the owner of Everyday Man Products, a sole proprietorship.
- 17. THOMAS L. TUCKER (hereinafter referred to as "TOM TUCKER") was the owner of New China Rugs, a sole proprietorship.

#### COUNT 2

#### THE GRAND JURY FURTHER CHARGES THAT:

A. During a period from in or about 1974 and continuously thereafter up to and including the date of the bringing of this Indictment, in the Eastern District of Virginia and elsewhere, defendants CHRIS RECKMEYER, ROB-ERT RECKMEYER and BRUCE THOMASON, the defendants herein, unlawfully, willfully, intentionally and knowingly did engage in a continuing criminal enterprise, in that these three defendants did knowingly, willfully, intentionally and unlawfully violate Title 21. United States Code. Section 841(a)(1); such violations, including but not limited to those violations alleged in Counts 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of this Indictment and which Counts are realleged and incorporated herein by reference as though fully set forth in this Count, were part of the continuing series of violations of Subchapters I and II of the Comprehensive Drug Abuse Control Act of 1970, Title 21. United States Code, Section 801 et seg., undertaken by defendants CHRIS RECKMEYER, ROBERT RECK-

MEYER, and BRUCE THOMASON, in concert with at least five other persons with respect to whom defendants CHRIS RECKMEYER, ROBERT RECKMEYER, and BRUCE THOMASON each occupied a position of organizer, supervisor and manager, and from which such continuing series of violations the said defendants obtained substantial income and resources.

#### B. Forfeiture

From their engagement in the aforesaid continuing criminal enterprise, the defendants CHRIS RECKMEYER, ROBERT RECKMEYER, and BRUCE THOMASON shall forfeit to the United States any profits they obtained arising from their participation in the said enterprise and any of their interests in, claims against, and property and contractual rights of any kind which afforded a source of influence over said enterprise, including but not limited to the following:

- 1. Condominium Unit Number M-48 in Estate Questa Verde, lying and being in Estate Hermon Hill, Company Quarter, Christianstead, St. Croix, U.S. Virgin Islands, together with 1.22366 percent individual interest in the common areas and facilities so declared in the Declaration of Condominium to be appurtenant to the above-described condominium unit; and all rental and lease income from condominium Unit Number M-48.
- 2. A parcel of land containing 675.49 acres, more or less, with all improvements, structures, livestock, machinery and appurtenances thereto, known as the "Shelburne Glebe" located on the southeast side of Road No. 729 approximately 4.5 miles southwest of Leesburg, in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 769 beginning at page 03 in the land records of Loudoun County, Virginia.
- 3. A parcel of land containing 50.19 acres with all improvements, structures, machinery, livestock and appurte-

nances thereto, located on the northwest side of Road No. 797 approximately 4.5 miles southwest of Leesburg, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 788 beginning at page 759 in the land records of Loudoun County, Virginia.

- 4. A parcel of land containing 10.0 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located on the northwest side of Road No. 797, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in Schedule A of the deed recorded in Deed Book 795 beginning at page 45 in the land records of Loudoun County, Virginia.
- 5. A parcel of land containing 146.2785 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located approximately three miles south of Hamilton, Blue Ridge Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 805 beginning at page 336 in the land records of Loudoun County, Virginia and in a subsequent recording, as evidenced by the transfer of title to William J. Reckmeyer, Sr., father of Chris Reckmeyer, as recorded by deed in Deed Book 836 beginning at page 184 in the land records of Loudoun County, Virginia.
- 6. A parcel of land containing 38.961 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located near Mt. Gilead in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described by a plat and survey of J. Horace Jarrett, C.L.S., dated August 17, 1982, a copy of which is attached to the deed recorded in Deed Book 819 beginning at page 860 in the land records of Loudoun County, Virginia.
- 7. A parcel of land containing 32.632 acres, with all improvements, structures, machinery, livestock and ap-

purtenances thereto, located near the northwest side of Franklin Gibson Road in the Eighth Election District of Anne Arundel County, Maryland and more particularly described in a legal description attached to the deed recorded in Deed Book 3466 beginning at page 253 among the land records of Anne Arundel County, Maryland and in a subsequent recording, as evidenced by the transfer of title to Jim Adams, brother-in-law of Robert Reckmeyer, as recorded in Deed Book 3466 beginning at page 253 in the land records of Anne Arundel County, Maryland.

- 8. Any and all precious metals owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest, including but not limited to: gold and silver bullion and coins, Baht gold jewelry, gold Canadian maple leaf coins, gold Krugerrand coins, gold and silver chains, and gold and silver bracelets.
- 9. Any and all precious gemstones owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest, including but not limited to: golden sapphires, Burma rubies, Thailand rubies, emeralds, tanzanites, pink sapphires, diamonds and pearls.
- 10. Any and all oriental carpets and/or rugs, silk tapestries and/or rugs, furniture, chests, antiques, and lamps owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest.
- 11. A deposit of \$2,500 held in escrow by Wellborn County Properties, Inc. for the purchase of 44.62 acres of land, including all improvements, located in Loudoun County, Virginia.

- 12. A January 6, 1984 promissory note payable to CHRIS RECKMEYER and Nancy Reckmeyer by William J. Reckmeyer, Sr. in the amount of \$112,500 plus accrued interest.
- 13. All accounts receivable of CHRIS RECKMEYER payable by Michael J. Kapper.
- 14. Eight oriental carpets totalling 162 square feet belonging to CHRIS RECKMEYER and held on consignment by Brett C. Leavenworth in Tucson, Arizona.
- 15. Any and all stock, assets and inventory of Unlimited Investments, Inc., a corporation in the State of Virginia, including but not limited to, all accounts at any financial institutions, typewriters, scales, file cabinets, safes and oval carpet.
- 16. Any and all of the shareholder and ownership interest of CHRIS RECKMEYER and Nancy L. Reckmeyer in B.C.P., Inc., a corporation in the State of California.
- 17. Any and all stock, financial, or other ownership interest of Chris Reckmeyer in American Deli, Inc., a corporation in the State of Florida.
- 18. A November 1983 promissory note in the amount of \$5,000 plus accrued interest payable to CHRIS RECK-MEYER by Mark B. Newman, President of the American Deli, Inc.
- 19. Any and all stock, assets and inventory of Crancy's Inc., a corporation in the State of Virginia.
- 20. Any and all stock, assets and inventory of Organic Foods, Inc., a corporation in the State of Virginia.
- 21. Any and all stock, assets and inventory of Manpower Management, Inc., a corporation in the State of Virginia.
- 22. Any and all stock, assets and inventory of United Trade, Inc., a corporation in the State of Maryland, also

- doing business as "East West Design" in the State of Virginia.
- 23. Any and all stock, assets and inventory of Robert Bruce Products.
- 24. Any and all stock, assets and inventory of Atlantis Stone Corporation, a corporation in the State of Delaware.
- 25. Any and all stock, assets and inventory of Mainland Carpets, Inc., a corporation in the State of Virginia.
- 26. Any and all possessions of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON with a retail value of \$1,000 or more, including but not limited to, furniture, musical instruments, appliances, carpets, electronic devices, art objects, and antiques; including but not limited to such possessions located at the "Shelburne Glebe" in Loudoun County, Virginia and at 12900 Westbrook Drive, in Centreville, Virginia.
- 27. A 1973 Mercedes-Benz four door sedan, vehicle identification number 11406012004068.
- 28. A 1974 Chevrolet two door coupe, vehicle identification number 1L57H4Y126501.
- 29. A 1976 Chrysler four door sedan, vehicle identification number CM41N6D164365.
- 30. A 1979 Ford Pickup Truck, vehicle identification number F26HEEJ3709.
- 31. A 1978 Chevrolet four door station wagon, vehicle identification number CCL168F203822.
- 32. A 1974 Cadillac four door sedan, vehicle identification number 6B69R4Q172668.
- 33. A 1979 Chevrolet station wagon, vehicle identification number CCS269F109212.
- 34. A 1984 Chevrolet station wagon, vehicle identification number 1G8GC26M5EF107085.

- 35. A 1976 Cadillac four door sedan, vehicle identification number 6B69S6Q215574.
- 36. A 1984 Chevrolet station wagon, vehicle identification number 1G8GK26M4EF107548.
- 37. A 1984 Mercedes Benz four door sedan, vehicle identification number WDBAB33A4EA038061.
- 38. A 1959 Mercedes Benz four door sedan, vehicle identification number 220S8513087.
  - 39. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON in monies deposited by or on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON, and/or their corporations, to any and all personal and corporate pension plans, money purchase plans, keogh plans, individual retirement accounts, annuity contracts or any other retirement or profit sharing funds including, but not limited to, the following:
    - a. Keogh Annuity Contracts numbers 4278206 and 4278207, each in the amount of \$7,500, and any accrued interest, in the names of CHRIS RECK-MEYER and Nancy Reckmeyer issued by the Franklin Life Insurance Company of Springfield, Illinois:
    - Sovran Bank account number 9381-2959 in the name of Crancy's, Inc. Money Purchase and Retirement Trust;
    - Sovran Bank account number 9381-2946 in the name of Crancy's, Inc., Profit Sharing and Retirement Trust;
    - d. Bank of New York account number S 063795054246 as agent for Merrill Lynch account number 795-05424 in the name of Unlimited Investments, Inc., Money Purchase Plan;

- e. Bank of New York account number S 063795054253 as agent for Merrill Lynch account number 795-05425 in the name of Unlimited Investments, Inc., Profit Sharing Plan;
- f. Calvert Group First Variable Rate Fund account number 113-061-6 in the name of United Trade, Inc., Profit Sharing Plan;
- g. Calvert Group First Variable Rate Fund account number 113062-4 in the name of United Trade, Inc. Money Purchase Plan;
- 40. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON in any monies deposited by or on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER or BRUCE THOMASON, and/or their corporations, in any safe deposit boxes and in any and all personal checking accounts, corporate checking accounts, savings accounts and any other accounts including, but not limited to, the following:
  - a. First Virginia Bank account number 8513-4120 in the name of CHRIS RECKMEYER and Nancy Reckmeyer;
  - First Virginia Bank account number 0716-1433 in the name of Crancy's, Inc.;
  - c. First Virginia Bank account number 0530-6728 in the name of Mainland Carpets, Inc.;
  - d. First Virginia Bank account number 8846-0312 in the name of BRUCE THOMASON and Marionlee Thomason;
  - e. First American Bank of Virginia account number 0624-4912 in the name of Unlimited Investments, Inc.;

- f. First American Bank of Virginia account number 0649-9198 in the name of Manpower Management, Inc.;
- g. Dominion National Bank of Virginia account number 4-250-280-1 in the name of Organic Foods, Inc.;
- Riggs National Bank account number 08-392-168
   in the name of Atlantis Stone Corporation;
- i. Calvert Group First Variable Rate Fund account number 143-404-2-101 in the name of Atlantis Stone Corporation;
- j. Calvert Group First Variable Rate Fund account number 001-001132786 in the name of ROBERT RECKMEYER:
- k. Calvert Group First Variable Rate Fund account number 89251-3 in the name of United Trade, Inc.
- 41. Approximately \$195,180.16, derived from the 1983 sale by ROBERT RECKMEYER and Patricia Reckmeyer of a parcel of real property and all appurtenances thereto, said property being known as "Gibraltar Farm" and containing approximately 176 acres located in Fauquier County, Virginia; all proceeds from the 1983 sale of said property and all accrued interest on the aforesaid \$195,180.16 since its November 15, 1983 seizure by the United States of America.

(All in violation of Title 21, United States Code, Section 848.)

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Cr. No. 85-00010A

UNITED STATES OF AMERICA

V.

CHRISTOPHER F. RECKMEYER, Et al.

#### NOTICE OF RECEIPT OF FUNDS FROM THE DEFENDANT

- Bernard S. Bailor, attorney for Christopher F. Reckmeyer, respectfully files this notice regarding the receipt of funds from the defendant Christopher F. Reckmeyer:
- 1. On January 25, 1985, I received approximately \$25,000 from Christopher F. Reckmeyer for the payment of attorney fees and other expenses for the defense of the above styled cause.
- 2. As attorneys for Christopher F. Reckmeyer, we have been enjoined by an Order of this Court dated January 14, 1985, from transferring any possessions of Christopher F. Reckmeyer, including currency having a retail value of in excess of \$1,000.
- 3. In compliance with this Court's Order dated January 14, 1985, we are holding the funds received from Christopher F. Reckmeyer in escrow and not transferring the same pending further Order of the Court.

Respectfully submitted,

BERNARD S. BAILOR
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5049

Dated: January 25, 1985

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

Cr. No. 85-00010A

UNITED STATES OF AMERICA,

Plaintiff,

V.

CHRISTOPHER F. RECKMEYER, II, et al., Defendants.

#### MOTION OF CHRISTOPHER F. RECKMEYER FOR AN ORDER MODIFYING RESTRAINING ORDER OF JANUARY 14, 1985 AND EXCLUDING ATTORNEY FEES AND COSTS FROM FORFEITURE

COMES NOW, Christopher F. Reckmeyer II, through undersigned counsel, and respectfully moves this Court for an Order modifying its restraining Order of January 14, 1985 so that monies paid and owed to his attorneys for legitimate fees and costs are excluded therefrom and from forfeiture.

The grounds for this Motion are set forth in the accompanying Memorandum.

Respectfully submitted,
CAPLIN & DRYSDALE, CHARTERED

Ralph A. Muoio One Thomas Circle Washington, D.C. 20005 (202) 862-5000

LERCH, EARLY, ROSEMAN & FRANKEL, CHARTERED

Stanley J. Reed 7101 Wisconsin Avenue Suite 1300 Bethesda, Md. 20814-4892 (301) 986-1300

Geoffrey J. Vitt 221 South Alfred Street Alexandria, Va. 22313 (202) 862-5000

Attorneys for Christopher F. Reckmeyer, II

Dated: March 7, 1985

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-00010A

UNITED STATES OF AMERICA,

Plaintiff.

V.

CHRISTOPHER F. RECKMEYER, II, et al., Defendants.

MEMORANDUM OF LAW IN SUPPORT OF CHRISTOPHER F. RECKMEYER'S MOTION FOR AN ORDER MODIFYING RESTRAINING ORDER OF JANUARY 14, 1985 AND EXCLUDING ATTORNEY FEES AND COSTS FROM FORFEITURE

This Memorandum is submitted in support of Christopher F. Reckmeyer's Motion to exclude from forfeiture and from the Court's January 14, 1985 restraining Order funds sufficient to pay legitimate attorney's fees and costs in order to secure effective assistance of counsel.

#### BACKGROUND

1. The law firm of Caplin & Drysdale, Chartered, ("C&D") has represented Christopher F. Reckmeyer (Reckmeyer) since the summer of 1983 in connection with the grand jury investigation that culminated in the indictment of Reckmeyer and others on January 15, 1985. During that period of time, bills were periodically rendered to Reckmeyer, or to corporations owned by him, for services rendered by C&D at the standard hourly rates for the attorneys involved, plus out-of-pocket disbursements.

- As of December 31, 1984, Reckmeyer had been billed for, and owed C&D, \$26,444.97 for services rendered and costs incurred through that date.
- 3. On or about January 14, 1985, C&D received by mail two checks, each in the amount of \$5,000, drawn on bank accounts in the name of two of Reckmeyer's corporations, Organic Foods, Inc. and Crancy's, Inc. Copies of these checks are attached as Exhibit A. The checks were deposited by C&D on January 14, 1985. See Exhibit B.
- 4. On January 14, 1985, this Court issued an Order restraining the transfer of assets by Reckmeyer and others. A copy of the restraining order is attached as Exhibit C. Specifically included in the Order were the two bank accounts upon which the checks described in paragraph 3 were drawn. (See Order ¶ 40 b. and g.)¹ On January 22, 1985, the two checks were returned unpaid to C&D. See Exhibit D.
- 5. On January 25, 1985, the day he surrendered, Reckmeyer paid C&D \$25,480. Notice of the receipt of these funds was filed with the Court that same day (Exhibit E) and the funds were deposited by C&D in a separate escrow account at the National Bank of Commerce in Washington, D.C. pending further order of the Court. See Exhibit F. As of January 24, 1985, Reckmeyer owed C&D \$36,599.40.
- 6. At Reckmeyer's request, C&D has continued to represent him in connection with the pending indictment and the trial scheduled to begin March 18, 1985. Stanley J. Reed, of the law firm of Lerch, Early, Roseman & Frankel, has also been retained to assist in Reckmeyer's defense. Because of the scope of the indictment and the seriousness of the offenses charged, a very substantial amount of time and expense has been and will continue to be incurred on Reckmeyer's behalf.

- 7. Except for the funds described above in paragraphs 3 and 5, neither C&D nor Lerch, Early, Roseman & Frankel has received any monies from or on behalf of Reckmeyer in satisfaction of amounts owed by him for legal fees and related expenses.
- 8. The Government has seized and has possession of a substantial amount of money belonging to Reckmeyer.

#### DISCUSSION

The issue raised by the present motion was decided on February 22, 1985 by the United States District Court for the District of Colorado. United States v. Rogers 84-CR-337. A copy of the Court's Memorandum Opinion and Order is attached as Exhibit G. The Court in Rogers held that the forfeiture provisions of the Comprehensive Crime Control Act of 1984 do not authorize the forfeiture of assets legitimately transferred to attorneys for services rendered. Although the Court was interpreting the forfeiture provision applicable to a RICO indictment, it recognized that the RICO and drug enforcement forfeiture provisions are virtually identical and relied on the legislative history of the drug provisions in interpreting the RICO provisions.

The Rogers opinion is thorough, well reasoned and correct. For the reasons discussed therein and in order to insure that Reckmeyer is not deprived of his rights to due process and to the effective assistance of counsel of his choice, an Order is requested which, among other things, does the following:

- (a) Authorizes Caplin & Drysdale, Chartered to receive the \$25,480 now in escrow at the National Bank of Commerce in partial payment of amounts owed to it by Reckmeyer;
- (b) Authorizes Caplin & Drysdale, Chartered to redeposit the two checks described in paragraphs 3 and 4 above and

Commonwealth Bank and Trust Company of Virginia is now known as Dominion National Bank of Virginia.

directs the two banks upon whom those checks are drawn to process them for payment;

(c) Authorizes a procedure under which Caplin & Drysdale, Chartered and Lerch, Early, Roseman & Frankel will be paid for ongoing services rendered and costs incurred in Reckmeyer's defense out of Reckmeyer's funds presently in the possession of the government or in the possession of third parties but frozen pursuant to the Court's restraining order of January 14, 1985.

Respectfully submitted,
CAPLIN & DRYSDALE, CHARTERED

Ralph A. Muoio One Thomas Circle Washington, D.C. 20005 (202) 862-5000

LERCH, EARLY, ROSEMAN & FRANKEL, CHARTERED

Stanley J. Reed 7101 Wisconsin Avenue Suite 1300 Bethesda, Md. 20814-4892 (301) 986-1300

CAPLIN & DRYSDALE, CHARTERED

Geoffrey J. Vitt 221 South Alfred Street Alexandria, Va. 22313 (202) 862-5000

Attorneys for Christopher F. Reckmeyer, II

Dated: March 7, 1985

#### IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-10-A

#### UNITED STATES OF AMERICA

V.

#### CHRISTOPHER RECKMEYER.

Defendant.

Friday, March 15, 1985 Alexandria, Virginia

Transcript of Defendant's Motion Modifying Restraining Order of January 14, 1985, in the above-captioned matter.

#### BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge United States District Court

#### APPEARANCES:

FOR THE UNITED STATES:

KENT ROBINSON, ESQUIRE KAREN P. TANDY, ESQUIRE JUNE SERAYDAR, ESQUIRE Assistant United States Attorneys 701 Prince Street Alexandria, Virginia 22314

FOR THE DEFENDANT:

GEOFFREY VITT, ESQUIRE BERNARD S. BAILOR, ESQUIRE RALPH A. MUOIO, ESQUIRE OF: CAPLIN & DRYSDALE 1101 17th Street, N.W. Washington, D.C. 20036

#### **PROCEEDINGS**

THE CLERK: Criminal Action No. 85-10-A, United States versus Christopher Reckmeyer.

MR. ROBINSON: Kent Robinson, Karen Tandy, and June Seraydar for the United States.

MR. VITT: Geoffrey Vitt, Bernard Bailor and Ralph Muoio appearing for the defendant.

THE COURT: Comes on on the defendant's motion for modification of the preliminary relief of the restraint.

MR. MUOIO: Good morning, Your Honor. My name is Ralph Muoio. I am with the firm of Caplin & Drysdale, which has been representing Christopher Reckmeyer since the Summer of '83. We will file a motion seeking to modify—

THE COURT: You have violated one of the cardinal rules in representing a defendant, and that's to get your fee up front.

MR. MUOIO: Well, under the Government's interpretation of the new rule, Your Honor, I'm not sure getting the fees up front would, under their view—

THE COURT: Well, at least they would have to come after you to get it instead of you having to come after forfeited property to get it.

MR. MUOIO: I have got \$25,000, which is one of the issues, and then we have a large bill, of course, which has run up since then.

THE COURT: I understand that's what prompted the motion.

MR. MUOIO: I think the decision in Rogers is correct, for the following reasons—

THE COURT: Rogers was a pretrial adjudication, though, wasn't it?

MR. MUOIO: It was a pretrial, yes.

THE COURT: There has been a plea of guilty here. Doesn't that alter the posture of the property that you seek to have released from restraining order?

MR. MUOIO: Well, Mr. Reckmeyer pled guilty yesterday. As I read the law, the forfeiture order which issues, will issue eventually, will issue at sentencing. At that point the Court will order the forfeiture of the assets.

THE COURT: Was the plea at all conditioned on Count 2? I mean, did it reserve any forfeitable or forfeiture allegations in Count 2?

MR. MUOIO: Not to my knowledge.

THE COURT: There has been an unconditional plea to Count 2.

MR. MUOIO: Unconditional plea to Count 2.

THE COURT: And Count 2 seeks forfeiture of all of these assets, doesn't it?

MR. MUOIO: Yes, Your Honor.

THE COURT: So they have been forfeited subject only to entry of the order of forfeiture?

MR. MUOIO: Correct, Your Honor.

THE COURT: Isn't then your appropriate remedy to apply—to assert an interest in that forfeitable property superior to the Government's interest?

MR. MUOIO: Yes.

THE COURT: I don't think you can do that in this proceeding, can you?

MR. MUOIO: Well, I think with respect to amounts we would attempt to recover for services rendered post in-

dictment which have not even been billed yet, I think we are probably relegated almost certainly to a post conviction or post forfeiture proceeding, which is subsection N proceeding; we could make our—take our position there. I'm not at all clear that we are in an appropriate forum now with respect to the \$25,000 which was paid to us in January post indictment, which we have, and which we have in an escrow bank account, as trustees. One of my requests in the motion was for permission to take that money—

THE COURT: Has the Government asserted an interest in that through the forfeiture under Count 2?

MR. MUOIO: Not directly, Your Honor. It's not listed, specifically listed in the indictment so we now have it in an escrow account or trust account in \$25,000 and some odd hundred, which was transferred to us for services that had been rendered. There was one other—

THE COURT: Before the return of the indictment or after the return of the indictment?

MR. MUOIO: The \$25,000 was after the return of the indictment. There was \$10,000 that was before the return of the indictment, which we received in the form of two checks before the indictment was published on the 15th. Those were deposited by a bookkeeper in the normal course on the 14th. They came in I think on a weekend, on the morning of the 14th which was a Monday; and on the 14th, your order was issued, your restraining order which was served also on the banks so the money, the checks went into our deposit. By the time they got to the bank upon which they were drawn, the restraining order had been served on the bank so the checks bounced. So we got three kinds of categories of money-the 10 pre-indictment, received but not cleared; the \$25,000 plus which was received post indictment for services that had been rendered; and fees and time charges and disbursements that have gone out since. I think the appropriate forum for the amounts that have been run up since may very well be post indictment petition or post forfeiture petition.

THE COURT: I'm not sure that modification of the temporary restraining order at this stage would change anything as a practical matter. If these funds had been forfeited as a result of the plea to Count 2, then they are forfeited without regard to any temporary restraining order but I don't know that. I hadn't thought that through until right now. The question whether they are forfeited or not I don't know is governed by the temporary restraining order.

MR. MUOIO: That's correct, Your Honor. In order to release those funds, Your Honor will have to agree with the Court in the Rogers case and find that those have been transferred to us for legitimate services rendered and are not within the scope of the forfeiture provisions.

THE COURT: Well, the theory of the forfeiture is that it didn't belong to the defendant to begin with, because it was the result of criminal activity. So I'm not sure that I agree completely with the Rogers case in its analysis. Let me hear from the Government.

MR. ROBINSON: Your Honor, first of all with respect to the plea that was entered yesterday, it did specifically call for forfeiture immediately of all assets listed in Count 2 of the indictment. That included aside from specific assets, it included all currency in the possession or ownership of the defendant. So clearly it would cover the \$25,000 that is part of the subject of this morning's proceeding. It also calls for forfeiture of the bank accounts of the defendant's businesses which are the accounts on which he wrote the checks to which defense counsel has referred this morning. In addition I would note that the \$10,000 written on those business bank accounts were in fact after the return of the indictment. The indictment was returned on January 9th, and I believe Mr. Muoio has just said that they were received some time after that point, approxi-

mately on the 14th. Once that plea of guilty is entered, particularly where it calls for immediate forfeiture as this one did, forfeiture is automatic. It has in effect taken place but for the entry of the formal order. So the Government would take the position that in effect all of the assets are now certainly in the possession of the Government. I don't think this is the appropriate proceeding for the resolution of third-party claims against the forfeited assets. I think the statute clearly sets forth how that is to take place and doesn't distinguish lawyers from any other creditors. That's all, Your Honor.

THE COURT: Yes?

MR. MUOIO: I would just like to point out one fact, if you will, Your Honor, because it was alluded to by Government counsel. It's the word currency in defendant's possession. The forfeiture count in the indictment lists a lot of assets but doesn't list currency in the possession of the defendant, strangely enough, at least as far as I can tell. The closest it comes is on page 45 of the indictment, paragraph 26. If you compare that paragraph with the way it was drafted in the Court's retraining order, one notes that in the restraining order the word currency is inserted in that paragraph in brackets, whereas, the word currency is not in the indictment. I see no catchall description in the count in the indictment that would reach currency in the possession of the defendant, although the restraining order would appear to cover currency in the possession-I'm not sure whether it does or not-the word currency is inserted in the /erbatim paragraph 26 in brackets. Arguably the count does not cover on its face currency in the possession of the defendant.

THE COURT: Well, you can argue that. I just don't think this is the proper place to do it. The temporary restraining order was a pendente lite type of relief to freeze things until there could be some adjudication under Count 2. There has now been that adjudication. I don't

think modification of the temporary restraining order, assuming it is still extant, affects whether those sums are forfeitable or not. I think you may argue that under Count 2 that what you have is not forfeitable but I don't think this is the appropriate place to do it. The Government takes the position that all of it is forfeitable or forfeited; and I think there is a statutory remedy for a third-party claim against what the Government undertakes to forfeit or forfeits; and I think that's the remedy you will have to pursue.

MR. MUOIO: We will pursue that, Your Honor.

THE COURT: I'm sure you will.

MR. MUOIO: Without waiving any rights that we have.

THE COURT: The motion for modification of the preliminary restraining order will be denied. (Thereupon, the proceedings in the above-captioned matter were concluded.)

. .

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-10-A

UNITED STATES OF AMERICA

V.

CHRISTOPHER RECKMEYER,

Defendant.

#### ORDER

For the reasons stated from the bench, it is hereby ORDERED that the motion of the defendant Christopher Reckmeyer for a modification of the court's temporary restraining order of January 14, 1985 is denied.

United States District Judge

Alexandria, Virginia March 15th, 1985

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

CRIMINAL NO. 85-00010-A

UNITED STATES OF AMERICA

V.

CHRISTOPHER F. RECKMEYER, II

#### CONSENT DECREE FOR FORFEITURE

COMES NOW the United States of America, by and through its undersigned counsel, and CHRISTOPHER F. RECKMEYER (hereinafter referred to as CHRIS RECK-MEYER), individually and by and through this counsel, to hereby agree and stipulate that the following property is knowingly and voluntarily forfeited to the United States of America:

- 1. A parcel of land containing 675.49 acres, more or less, with all improvements, structures, livestock, machinery and appurtenances thereto, known as the "Shelburne Glebe" located on the southeast side of Road No. 729 approximately 4.5 miles southwest of Leesburg, in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 769 beginning at page 03 in the land records of Loudoun County, Virginia.
- 2. A parcel of land containing 50.19 acres with all improvements, structures, machinery, livestock and appurtenances thereto, located on the northwest side of Road No. 797 approximately

- 4.5 miles southwest of Leesburg, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 788 beginning at page 759 in the land records of Loudoun County, Virginia.
- 3. A parcel of land containing 10.0 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located on the northwest side of Road No. 797, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in Schedule A of the deed recorded in Deed Book 795 beginning at page 45 in the land records of Loudoun County, Virginia.
- 4. A parcel of land containing 146.2785 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located approximately three miles south of Hamilton, Blue Ridge Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 805 beginning at page 336 in the land records of Loudoun County, Virginia and in a subsequent recording, as evidenced by the transfer of title to William J. Reckmeyer, Sr., father of Chris Reckmeyer, as recorded by deed in Deed Book 836 beginning at page 184 in the land records of Loudoun County, Virginia.
- 5. A parcel of land containing 38.961 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located near Mt. Gilead in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described by a plat and survey of J. Horace Jarrett, C.L.S., dated August 17, 1982, a copy of which is attached to the deed recorded in Deed Book

- 819 beginning at page 860 in the land records of Loudoun County, Virginia.
- 6. Any and all precious metals owned by or held on behalf of CHRIS RECKMEYER and/or the business entities which he controls and/or holds any interest, including but not limited to: gold and silver bullion and coins, Baht gold jewelry, gold Canadian maple leaf coins, gold Krugerrand coins, gold and silver chains, and gold and silver bracelets.
- 7. Any and all precious gemstones owned by or held on behalf of CHRIS RECKMEYER and/ or \_\_\_\_\_\_, emeralds, tanzanites, pink sapphires, diamonds and pearls.
- 8. Any and all oriental carpets and/or rugs, silk tapestries and/or rugs, furniture, chests, antiques, and lamps owned by or held on behalf of CHRIS RECKMEYER and/or the business entities which he controls and/or holds any interest.
- 9. A deposit of \$2,500 held in escrow by Wellborn County Properties, Inc. for the purchase of 44.62 acres of land, including all improvements, located in Loudoun County, Virginia.
- 10. A January 6, 1984 promissory note payable to CHRIS RECKMEYER and Nancy Reckmeyer by William John Reckmeyer, Sr. in the amount of \$112,500 plus accrued interest.
- 11. All accounts receivable of CHRIS RECK-MEYER and/or the business entities which he controls and/or holds any interest including, but not limited to, all accounts payable by Michael J. Kapper and Robert B. Reckmeyer.
- 12. Eight oriental carpets totalling 162 square feet belonging to CHRIS RECKMEYER and held

on consignment by Brett C. Leavenworth in Tucson, Arizona.

- 13. Any and all stock, assets and inventory of Unlimited Investments, Inc., a corporation in the State of Virginia, including but not limited to, all accounts at any financial institutions, typewriters, scales, file cabinets, safes and oval carpet.
- 14. Any and all of the shareholder and ownership interest of CHRIS RECKMEYER and Nancy L. Reckmeyer in B.C.P., Inc., a corporation in the State of California.
- 15. Any and all stock, financial, or other ownership interest of CHRIS RECKMEYER in American Deli, Inc., a corporation in the State of Florida.
- 16. A November 1983 promissory note in the amount of \$5,000 plus accrued interest payable to CHRIS RECKMEYER by Mark B. Newman, President of the American Deli, Inc.
- Any and all stock, assets and inventory of Crancy's Inc., a corporation in the State of Virginia.
- 18. Any and all stock, assets and inventory of Organic Foods, Inc., a corporation in the State of Virginia.
- Any and all stock, assets and inventory of Manpower Management, Inc., a corporation in the State of Virginia.
- 20. Any and all possessions of CHRIS RECK-MEYER with a retail value of \$1,000 or more, including but not limited to, furniture, musical instruments, appliances, carpets, electronic devices, art objects, antiques and currency; including but not limited to such possessions located

- at the "Shelburne Glebe" in Loudoun County, Virginia.
- A 1978 Chevrolet four door station wagon, vehicle identification number CCL168F203822.
- A 1974 Cadillac four door sedan, vehicle identification number 6B69R4Q172668.
- A 1979 Chevrolet station wagon, vehicle identification number CCS269F109212.
- A 1984 Chevrolet station wagon, vehicle identification number 1G8GC26M5EF107085.
- A 1976 Cadillac four door sedan, vehicle identification number 6B69S6Q215574.
- A 1984 Chevrolet station wagon, vehicle identification number 1G8GK26M4EF107548.
- 27. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER in monies deposited by or on behalf of CHRIS RECKMEYER and/or his business entities, to any and all personal and corporate pension plans, money purchase plans, keogh plans, individual retirement accounts, annuity contracts or any other retirement or profit sharing funds including, but not limited to, the following:
  - a. Keogh Annuity Contracts numbers 4278206 and 4278207, each in the amount of \$7,500, and any accrued interest, in the names of CHRIS RECKMEYER and Nancy Reckmeyer issued by the Franklin Life Insurance Company of Springfield, Illinois;
  - Sovran Bank account number 9381-2959 in the name of Crancy's, Inc. Money Purchase and Retirement Trust;

- c. Sovran Bank account number 9381-2946 in the name of Crancy's, Inc., Profit Sharing and Retirement Trust;
- d. Bank of New York account number S 063795054246 as agent for Merrill Lynch account number 795-05424 in the name of Unlimited Investments, Inc., Money Purchase Plan;
- e. Bank of New York account number S 063795054253 as agent for Merrill Lynch account number 795-05425 in the name of Unlimited Investments, Inc., Profit Sharing Plan;
- f. First American Bank of Virginia, Individual Retirement Account Numbers 240102282 and 24-0102231, Certificates of Deposit Numbers 721509 and 721504 in the names of CHRIS RECKMEYER and Nancy Reckmeyer.
- 28. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER in any monies deposited by or on behalf of CHRIS RECKMEYER and/or his business entities, in any safe deposit boxes and in any and all personal checking accounts, corporate checking accounts, savings accounts and any other accounts including, but not limited to, the following:
  - a. First Virginia Bank account number 85134120 in the name of CHRIS RECK-MEYER and Nancy Reckmeyer;
  - First Virginia Bank account number 07161433 in the name of Crancy's, Inc.;
  - First American Bank of Virginia account number 0624-4912 in the name of Unlimited Investments, Inc.;

- d. First American Bank of Virginia account number 0649-9198 in the name of Manpower Management, Inc.;
- e. Dominion National Bank of Virginia account number 4-250-280-1 in the name of Organic Foods, Inc.;
- 29. All assets listed on Attachments 1 through 37, incorporated herein by reference;
- 30. All monies and funds restrained by the January 14, 1985 restraining order entered in the above-styled case, including but not limited to the approximately \$25,000 held in escrow by Bernard S. Bailor and/or his agents;
- 31. All assets and items seized by law enforcement agents during the period January 15-18, 1985 from the "Shelburne Glebe" located in Loudoun County, Virginia; the Organic Foods warehouse located at 118 Underwood Lane, Unit D, Sterling, Virginia; and the Crancy's warehouse located at 118 Underwood Lane, Unit F, Sterling, Virginia; including but not limited to oriental carpets, chinese vases and lamps with shades, carved wooden chests, silver, tiffany lamp shades and furniture;
- 32. A September 10, 1984 promissory note in the amount of \$39,000.00 plus accrued interest payable to Crancy's Inc. Money Purchase Plan Trust and/or its agents by Dr. William John Reckmeyer and/or Wearever, Inc. or their assigns;
- 33. A September 10, 1984 promissory note in the amount of \$31,000.00 plus accrued interest payable to Crancy's Inc. Profit Sharing Plan Trust and/or its agents by Dr. William John

Reckmeyer and/or Wearever, Inc. or their assigns.

Said forfeited property being the proceeds and profits which CHRISTOPHER F. RECKMEYER, II obtained arising from his participation in a continuing criminal enterprise and his interests in, claims against, and property and contractual rights which afforded a source of influence over the continuing criminal enterprise, and as such, the above listed properties are thereby subject to forfeiture pursuant to the March 14, 1985 plea agreement entered into in the Eastern District of Virginia between the United States of America and CHRISTOPHER F. RECKMEYER.

SEEN AND AGREED:

#### ELSIE L. MUNSELL UNITED STATES ATTORNEY

By: /s/
KAREN P. TANDY
Assistant United States Attorney

Christopher F. Reckmeyer
Defendant

Date

Stanley J. Reed
Counsel for Defendant

#### ORDER

Based upon the foregoing stipulation and agreement and for the reasons stated at bar, it is hereby

ORDERED, ADJUDGED and DECREED that each of the properties listed in the foregoing Consent Decree for Forfeiture is hereby condemned and forfeited to the United States of America, the said properties to be seized forthwith by the United States Marshal for the Eastern District of Virginia or his authorized representative, and disposed of in accordance with the law; it being further

ORDERED, ADJUDGED and DECREED that the defendant CHRIS RECKMEYER shall immediately notify the United States of America if the whereabouts of any of the above forfeited assets become known to him following the entry of this Order and shall immediately deliver said forfeited properties to the United States Marshal of the Eastern District of Virginia.

This 17th day of May, 1985.

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-00010A

UNITED STATES OF AMERICA,

Plaintiff,

V.

CHRISTOPHER F. RECKMEYER, II,

Defendant.

#### CLAIM OF CAPLIN & DRYSDALE, CHARTERED, OF INTEREST IN FORFEITED PROPERTY AND PETITION FOR HEARING TO ADJUDICATE VALIDITY OF CLAIMED INTEREST

Pursuant to 21 U.S.C. § 853(n), Caplin & Drysdale, Chartered, hereby claims an interest in the property of Christopher F. Reckmeyer subject to the Forfeiture Order entered by this Court on May 17, 1985 and petitions this Court for a hearing to adjudicate the validity of its claim and interest in property. This Court has jurisdiction over this action under Title 21, U.S.C. § 853. In support of this claim and petition, Caplin & Drysdale, Chartered asserts the following:

- 1. Petitioner, Caplin & Drysdale, Chartered, is a law firm incorporated in the District of Columbia with offices at One Thomas Circle, Washington, D.C. 20005.
- Caplin & Drysdale, Chartered, has rendered legal services and represented Christopher F. Reckmeyer (Reckmeyer) and corporations owned by him since the summer of 1983.

- 3. Prior to December 31, 1984 bills were periodically rendered to Reckmeyer, or to corporations owned by him, for services rendered by Caplin & Drysdale, Chartered at the standard hourly rates for the attorneys involved, plus out-of-pocket disbursements.
- 4. As of December 31, 1984, Reckmeyer had been billed for, and owed Caplin & Drysdale, Chartered, \$26,444.97 for services rendered and costs incurred in the representation through that date.
- 5. On or about January 14, 1985, Caplin & Drysdale, Chartered received two checks, each in the amount of \$5,000.00, drawn on the bank accounts of two of Reckmeyer's corporations, Organic Foods, Inc. and Crancy's Inc. Copies of these checks are attached as Exhibit A. The checks were deposited on January 14, 1985. See Exhibit B.
- 6. On January 14, 1985, this Court issued an Order restraining the transfer of assets by Reckmeyer and others. A copy of the restraining order is attached as Exhibit C. As a result of this restraining order the two checks discussed in paragraph 5, above, were returned unpaid to Caplin & Drysdale, Chartered. See Exhibit D.
- 7. Prior to January 25, 1985, Reckmeyer continuously represented to Caplin & Drysdale, Chartered, that he was not involved in the distribution of marijuana or other controlled dangerous substances. Caplin & Drysdale, Chartered, provided legal services to Reckmeyer prior to January 25, 1985 in a good faith belief that Reckmeyer was not involved in trafficking in marijuana or other dangerous substances.
- 8. On January 25, 1985, the day he surrendered, Reckmeyer paid Caplin & Drysdale, Chartered \$25,480.00. Notice of the receipt of these funds was filed with the Court (Exhibit E) and the funds were deposited by Caplin & Drysdale, Chartered in a separate escrow account at the

National Bank of Commerce in Washington, D.C. pending further order of the Court. See Exhibit F.

- As of January 24, 1985, Reckmeyer owed Caplin & Drysdale, Chartered \$36,599.40.
- 10. At Reckmeyer's request, Caplin & Drysdale, Chartered continued to represent him in his defense of the indictment returned in the Eastern District of Virginia.
- 11. In defending the charges against Reckmeyer, Caplin & Drysdale, Chartered incurred the following expenses and time charges:
  - a. Disbursements for the retention of Stanley J. Reed of Lerch, Early, Roseman & Frankel to assist in Mr. Reckmeyer's defense. Mr. Reed was retained in order to comply with the requirements of Canon 6, ABA Code of Professional Responsibility because Caplin & Drysdale, Chartered was not experienced in defense of drug cases. (Exhibit G). \$46,975.54
  - Other disbursements in connection with the defense (xerox, telephone, investigators, etc.)
     See Exhibit H. \$14,313.95
  - c. Caplin & Drysdale, Chartered attorney time charges. \$109,223.50
- 12. None of the amounts set forth in paragraph 12 have been paid to Caplin & Drysdale, Chartered.
- 13. In rendering the services to Mr. Reckmeyer, Caplin & Drysdale, Chartered was a good faith provider of services for value.

#### CLAIM FOR RELIEF

Caplin & Drysdale, Chartered, therefore, requests that the Order of Forfeiture entered by this Court on May 17, 1985 be amended so that, among other things, it does the following:

- (a) Authorizes Caplin & Drysdale, Chartered to receive the \$25,480.00 which was held in escrow at the National Bank of Commerce in partial payment of amounts owed to it by Reckmeyer;
- (b) Authorizes Caplin & Drysdale, Chartered to re-deposit the two checks totalling \$10,000.00 described in paragraphs 3 and 4 above and directs the two banks upon whom those checks are drawn to process them for payment;
- (c) Authorizes Caplin & Drysdale, Chartered to be paid \$161,477.96 for all services rendered and costs incurred in Reckmeyer's defense out of Reckmeyer's funds presently in the possession of the government or in the possession of third parties but frozen pursuant to the Court's restraining order of January 14, 1985 and the Order of Forfeiture of May 17, 1985.

Respectfully submitted.

CAPLIN & DRYSDALE, CHARTERED

Bernard S. Bailor
Peter Van N. Lockwood
One Thomas Circle
Washington, D.C. 20005
(202) 862-5000

Geoffrey Judd Vitt 221 S. Alfred Street Alexandria, Virginia 22313 (202) 862-5000

#### JA-71

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-00010-A

UNITED STATES OF AMERICA.

Plaintiff,

V.

CHRISTOPHER F. RECKMEYER II, et al., Defendants.

## GOVERNMENT'S CONSOLIDATED RESPONSE TO PETITIONS FOR RELIEF FROM FORFEITURE

COMES NOW the United States of America, by its attorney, Elsie L. Munsell, United States Attorney for the Eastern District of Virginia; Karen P. Tandy, Assistant United States Attorney, and Kent S. Robinson, Assistant United States Attorney, and responds to and opposes, in whole or in part, the petitions for relief from forfeiture filed by the following claimants:

- (1) Nancy Reckmeyer.
- (2) William J. Reckmeyer, Sr.
- (3) Patrick R. Hendry and Reginald G. Miller.
- (4) Caplin and Drysdale, Chartered.
- (5) Charles and Jean Lane.
- (6) William Pruzan.

These claims, which will be more fully explained in the attached memorandum of points and authorities, represent the only claims on which there is a substantial dispute between the parties. For the reasons set forth in the attached memorandum of points and authorities, the United

States respectfully submits that the remaining claims should be denied.

Respectfully submitted, ELSIE L. MUNSEL UNITED STATES ATTORNEY

By: /s/
Karen P. Tandy
Assistant United States Attorney
/s/
Kent S. Robinson
Assistant United States Attorney

# MEMORANDUM OF POINTS AND AUTHORITIES TABLE OF CONTENTS

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  - A. William J. Reckmeyer, Sr.
  - B. Caplin and Drysdale, Chartered
  - C. Charles and Jean Lane
  - D. Patrick R. Hendry and Reginald G. Miller

#### I. FACTUAL INFORMATION

On January 9, 1985, Christopher and Robert Reckmeyer were indicted on a variety of charges including Continuing Criminal Enterprises (CCE), in violation of 21 U.S.C., Section 848. The indictment sought forfeiture of any profits obtained by the Reckmeyers from their participation in the enterprise, and any property which afforded a source of influence over the enterprise. Numerous specific assets, including most of those for which petitions have been filed, were set forth in the indictment.

On March 13, 1985 Robert Reckmeyer pled guilty to the CCE charge, among others, and agreed to forfeiture of the proceeds of his enterprise. On April 26, 1985, Robert

Reckmeyer signed a consent decree of forfeiture, which resulted in this court ordering the forfeiture of all his properties and assets. Claims have now been made, and are pending before this Court, by William J. Reckmeyer, Sr. on assets described in that consent decree and order as follows:

- A 1971 Ford Pickup Truck, vehicle identification number F26HEEJ3709;
- 15. Jumbo Certificate of Deposit number C-2203 at the First Commonwealth Savings and Loan, Alexandria, Virginia . . .;

#### II. STATUTORY BACKGROUND

#### A. Forfeiture Under the Comprehensive Crime Control Act of 1984

The forfeiture provisions of the Comprehensive Crime Control Act of 1984 were enacted to enhance the use of forfeiture as a tool in combatting drug trafficking. S. Rpt. No. 225, Comprehensive Crime Control Act of 1983, 98th Cong., 1st Sess. 191 (1983) (copy attached) [hereinafter Legislative History]. The Legislative History of the statute cogently states:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant viol-

William J. Reckmeyer, Sr. has also made a claim that he is owed reimbursement for expenses incurred on behalf of Robert Reckmeyer's wife and children, without identifying any asset from which this claim should be paid.

ence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

Id. -

The purpose of the new statute was to cure some ambiguities and weaknesses of forfeiture law, by improving the procedures applicable in such cases. Id. at 192. The most fundamental change enacted by the new statute was the codification of what was known as the "relation-back" principle. Section 853(c), of Title 21, states that "all right, title, and interest [in forfeited property] vests in the United States upon the commission of the act giving rise to forfeiture under this section." The application of this principle to forfeiture cases was first recognized and approved in United States v. Stowell, 133 U.S. 1, 17-18 (1890). The 1984 statute removed any doubt that this principle was applicable in criminal forfeiture cases.

A necessary consequence of the relation-back principle is the voiding of any and all transfers of forfeitable assets by the defendant to third parties. The statute also encompasses this principle, stating "Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States. . . ." This provision codifies the rule, again first recognized in Stowell, that forfeiture "avoids all intermediate sales and alienations, even to purchasers in good faith." United States v. Stowell, supra, 133 U.S. at 18.

Congress explicitly stated its reasons for incorporating the relation-back principle in criminal cases. It noted that preconviction transfers of assets, if allowed to frustrate forfeiture, would dramatically undercut the use of forfeiture as a crime fighting tool. Legislative History, supra, at 195-196. It noted that such frustrating transfers were avoided in civil cases through the use of the relation-back principle, and expressly sought to apply that principle in the criminal context. Id. at 196, 200-201.

The forfeiture prescribed by the 1984 act is essentially automatic. Property is forfeitable if it constitutes a defendants proceeds from a drug business, is used to facilitate that business, or affords a source of control over a continuing criminal enterprise. 21 U.S.C. § 853(a). Once property falls within one of these categories, it "shall" be forfeited by the court. As the factual introduction above establishes, the Reckmeyers' property fits these descriptions and has therefore already been forfeited by the court.

Once a forfeiture order has been entered, third parties may claim an interest in the forfeited property by filing a petition for relief with the court. 21 U.S.C. § 853(n). This section was enacted in recognition of the potentially harsh consequences of the relation-back principle on innocent persons. Legislative History, supra, at 207-208. The statute provides that certain interests in forfeited property, more fully discussed below, will be protected. 21 U.S.C. § 853(n). That is the sole and exclusive judicial remedy open to persons claiming an interest in forfeited property. 21 U.S.C. § 853(k).

#### B. Third Party Claims

Section 853(n) of Title 21 sets forth two circumstances in which a petitioner's interest in property will be protected:

(A) The petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant, or was superior to any right, title,

or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under the subsection; or

(B) The petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

The rights protected by this statutory section are obviously quite limited. It provides only for legal claims to property. Congress clearly stated that the administrative remission process "would remain the appropriate exclusive remedy for third parties who are asserting not a legal bases for relief, but rather more equitable grounds." Legislative History, supra, at 208.

#### 1.) Scope of In Personam Forfeiture

Among the concerns about forfeiture law expressed by Congress was the fact that so many claims had to be handled civilly. Legislative History, supra, at 196. Because such litigation is in rem, it must be pursued in the district in which the property was located. The result was inefficient, multiple litigation. Congress clearly expressed its desire to allow for all forfeiture matters to be consolidated in the criminal proceeding. Id. at 197.

It therefore is apparent that Congress intended the in personam, criminal forfeiture embodied by the new statute to have the same reach as in rem jurisdiction. Surely Congress did not seek to make forfeiture more efficient by simply adding another layer of criminal proceedings which would then necessarily be followed by civil proceedings to reach other assets. That is precisely why the relation-back principle was incorporated into the statute.

Civil forfeiture law thus provides relevant authority to the present action. The principles of standing set forth in civil forfeiture cases obviously are applicable to criminal cases. Congress did not intend for the court to allow a party standing to contest criminal forfeiture, when that individual would not have standing in the civil context. Similarly, when an individual's claim that he is an innocent owner of property would not prevail in the civil context, it should not fare any better in the criminal case.

## B. Caplin and Drysdale, Chartered's, Claim for Attorney's Fees

Caplin and Drysdale, Chartered, a Washington, D.C. law firm, seeks release of Christopher Reckmeyer's funds to compensate the firm for representing Reckmeyer. Three separate claims are made. First, the firm asks to be allowed to cash two checks received from Reckmeyer, each in the amount of \$5,000, which bounced because of the Restraining Order. Second, the firm seeks to retain \$25,444.97 delivered to it at the time Reckmeyer turned himself in. Finally, the firm seeks a distribution of Reckmeyer's funds to cover the remainder of his outstanding legal fees, which presently total in excess of \$170,000.

The Government opposes this claim on two grounds. First, Caplin and Drysdale lacks standing to challenge the forfeiture, because it cannot claim a right, title or interest in the funds. Caplin and Drysdale cannot satisfy the statutory requirement that any interest they did obtain was without reasonable cause to believe the funds were subject to forfeiture.

#### 1. Standing

As noted above, an individual has no standing to challenge a forfeiture unless he can claim a "right, title, or interest in that property." 21 U.S.C. § 853(a)(6)(B). Caplin and Drysdale fails that first test.

Several courts have addressed the rights of innocent parties who hold checks on forfeited bank accounts. In

every instance, the court has held that the holders of such checks lack standing because they have no ownership or possessory interest in the deposits to the account. United States v. Four Million, Two Hundred, Fifty Thousand Dollars, 762 F.2d 895, 907 (11th Cir. 1985); United States v. Sonal, 573 F. Supp. 1126 (S.D.N.Y. 1983). These decisions rely on the Uniform Commercial Code for the proposition that a check is not an assignment, in law or equity, of an interest in the deposits of an account, unless the check is accepted by the drawee bank. The Virginia Code contains identical provisions. Va. Code §§ 8.3-409, 8.3-410. Indeed, one court specifically held that a check written to an attorney did not constitute an assignment of funds, and denied standing. United States v. Four Million, etc., 762 F.2d at 907 n.27. Clearly Caplin and Drysdale do not have standing to contest the forfeiture of the bank accounts on which the checks were drawn.

Similarly, they do not have any right, title or interest in the general funds of Christopher Reckmeyer. There are numerous cases which hold that simple, unsecured creditors, do not have a sufficient ownership interest to contest the forfeiture of the funds of the debtor. United States v. \$47,875.00 in U.S. Currency, 746 F.2d 291 (5th Cir. 1984); United States v. Five Hundred Thousand Dollars, 730 F.2d 1437 (11th Cir. 1984); United States v. \$3,799 in United States Currency, 684 F.2d 674, 678 (10th Cir. 1982). Those principles apply to the funds of Christopher Reckmeyer.

The Government concedes the standing of Caplin and Drysdale to contest the forfeiture of the \$25,444.97 actually delivered to it by Reckmeyer.

#### 2. Forfeitability

The exact basis for Caplin and Drysdale's claim for relief is unclear. They do not specifically state that they are "reasonably without cause to believe that the property was subject to forfeiture." This raises the possibility that they are claiming that legitimate attorney's fees are not for-feitable. Both possible claims will be addressed.

#### a. Knowledge of Forfeitability

Caplin and Drysdale's petition states that Reckmeyer continuously represented to them that he was not involved in drugs. In addition, it states that they provided legal services in the good faith belief that he was not involved in drugs. Obviously, these statements stop short of claiming that they were without reasonable cause to believe Reckmeyer was involved in drugs, because such a claim would be ludicrous.

At the outset, it must be noted that any claim of ignorance by Caplin and Drysdale can only relate to the preindictment period. They were served, on January 14, 1985, with a restraining order giving them actual notice of the forfeitability of Reckmeyer's assets, including currency. (See ¶ 26 of Restraining Order, Exhibit D to Caplin and Drysdale's petition.) Clearly they were actually aware of the forfeitability of the currency subsequently delivered to them by Reckmeyer, and of the other assets against which they made a claim for subsequent services. Hence, they can only claim ignorance for the fees and expenses owed prior to indictment. *United States v. Raimondo*, 721 F.2d 476, 478 (4th Cir. 1984) (attorneys put on notice by indictment of forfeitability of assets).

The Court need not intrude into the confidential communications between Caplin and Drysdale and their client to determine the firm's knowledge. The external circumstances create a clear enough picture. Firm lawyers were advised several times about the existence and scope of the investigation. Firm members, together with lawyers representing other targets, routinely debriefed grand jury witnesses such as Dan Rudicille, who implicated their client. The various lawyers representing targets apparently shared information. Certainly, Caplin and Drysdale was aware of

the civil forfeiture action brought against Robert Reckmeyer's assets, on the ground that they are drug proceeds.

#### b. Legal Fees

The clear proof that Caplin and Drysdale was aware of the forfeitability of Reckmeyer's assets, particularly after the indictment, reduces their claim to a legal issue: whether legal fees are forfeitable. This is an issue informed by prior case law, the language and history of the 1984 statute, and Sixth Amendment considerations.

#### i.) Prior Law

Legal fees have never been accorded different legal status than any other disbursement by an individual. See United States v. Jeffers, 532 F.2d 1101, 1105 (7th Cir. 1976) (compelled testimony as to legal fees "elicited no more than would have been elicited by introducing evidence that the defendant had bought a Rolls-Royce for cash"), rev'd in part on other grounds, 432 U.S. 132 (1977). Attorneys are treated as all other creditors. For example, taxpayers have not been allowed the release of funds subject to tax liens for the purpose of paying attorneys to fight the liens. Illinois Redi-Mix Corp. v. Cayle, 360 F.2d 848 (7th Cir. 1966); Lloyd v. Paterson, 242 F.2d 742 (5th Cir. 1957).

Similarly, claims by attorneys in the context of forfeiture proceedings have always been held to the same legal requirements as other claims. See United States v. Four Million, etc., supra, 762 F.2d at 907 n.27 (attorney's claim to forfeited assets denied because inadequate assignment); United States v. \$48,318, supra, 609 F.2d at 214-215 (inadequate notice of assignment). Legal fees have never been exempted from forfeiture. In United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1984), the Fourth Circuit ruled that the transfer of an asset to an attorney did not place it beyond forfeiture. Although the decision left open to the attorney the possibility of further challenge to the

forfeiture, id., it nonetheless stands for the proposition that transfers of forfeitable property to attorneys do not hold an exalted place in forfeiture law. Similarly, in *United States v. Long, supra*, an asset transferred to attorneys pre-indictment, for payment of legitimate attorneys fees, was forfeited because the attorneys are well aware of its potential forfeitability. Finally, in *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979), a defendant's attempt to exempt funds for attorney's fees from a restraining order was denied, despite a Sixth Amendment claim.

Given this legal context, Reckmeyer's funds would have been forfeited even before passage of the 1984 act.

#### ii.) The 1984 Statute

Application of the 1984 Statute has produced inconsistent judicial rulings. Courts have disagreed over whether Congress intended attorney's fees to be forfeitable, and whether attorney's fees fall within the subsection (B) provision for bona fide purchases.

No prior case has addressed the question in the present context. They all involved pre-conviction, pre-forfeiture attempts to release funds from restrained assets for representation in the criminal case. This is the first case in which a court has been asked to release proven drug proceeds to attorneys.

Each court to have addressed the subject seems to concede that the statute, literally construed, would reach attorney's fees. See United States v. Badalementi, 84 CR 36, slip op. at 3 (S.D.N.Y. July 10, 1985). Despite that apparent clarity, however, courts are troubled by the failure of Congress to expressly include attorney's fees in forfeitable assets. Id., United States v. Ianniello, 85 CR 115, slip op. at 7-8 (S.D.N.Y. September 3, 1985). One court has seen this failure to refer to attorney's fees as an indication that Congress must not have intended to include them, United States v. Badalementi, supra, while

another finds this sufficiently ambiguous to require reference to the legislative history, *United States v. Ianniello*, supra. Both of these views ignore the substantial body of case law, cited above, which allowed for seizure of attorney's fees prior to the 1984 statute. Attorneys have never been treated as a separate class in forfeiture law, there was no reason for Congress to refer specifically to them.

Indeed, if one looks beyond the clear language of this statute, one of the first cannons of statutory construction is that Congress is pressured to be aware of prior law, and to have adopted it absent a clearly stated departure. See Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979). In the present case, presumptions need not be indulged in. Congress actually cited to prior law with approval. In discussing how the relation-back principle should work. Congress cited to United States v. Long, supra, and described its holding by saying that property "remained subject to criminal forfeiture although transferred to the defendant's attorney." Legislative History, supra, at 200 n.28. Obviously, Congress was aware of and endorsed prior law, and recognized the implications of the relation-back principle to attorney's fees. The failure of this statute to make specific reference to attorney's fees is not the result of oversight, but rather the continuation of the legal philosophy, embodied in the case law above, that attorney's fees are subject to the same laws as other creditors. Those cases which have held attorney's fees outside the intent of Congress have simply ignored the citation to Long.

While ignoring the Long citation, several courts have turned to a preliminary House report on an earlier draft of a different forfeiture statute. See United States v. Badalementi, supra, at 6; United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Col. 1985). Obviously, such legislative history is of far less informative value than the final report on the statute here employed. Yet two counts have latched onto the following phrase: "Nothing in this section is in-

tended to interfere with a person's Sixth Amendment right to counsel." Id. But the following sentence from that report, a sentence ignored by Rogers, places that quote in context: "The Committee . . . does not resolve the conflict in District Court opinions on the use of restraining orders that infringe on a person's right to retain counsel in a criminal case." H.R. Rep. No. 845, pt. 1, 98th Cong., 2d Sess. 19 n.1 (1984). Obviously, Congress was discussing only pretrial orders, which is not the issue here. Moreover, Congress clearly did not mean to abrogate the case law discussed above. In re Grand Jury Subpoena (Simels), 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y. 1985), rev'd in part on other grounds, \_\_\_ F.2d \_\_\_ (2d Cir. 1985) (reversed because of grand jury abuse).

In a final move to exempt attorney's fees, two courts have concluded that subsection (B), relating to bona fide purchases, was meant to void only sham transactions, and not ones in which there had been a legitimate exchange, such as for attorney's fees. United States v. Ianniello, supra; United States v. Rogers, supra, 602 F. Supp. at 1347. At best, these rulings are ill-considered and, at worst, amount to a rewriting of the statute. Congress voided all transfers in which the third party had "reasonable cause to believe" the property was forfeitable. Obviously, this reaches a broader range of transactions than simple shams. Congress clearly considered, much more clearly than these courts, which transfers it sought to void. To limit the statute to shams would clearly frustrate Congressional intent. In re Grand Jury Subpoena (Simels), supra, 605 F. Supp. at 849 n.14.

In the Government's view the correct interpretation was made in *In re Grand Jury Subpoena (Simels)*, supra. The funds which the attorneys now seek to obtain do not, and never did, belong to Christopher Reckmeyer. One who enters into a transaction knowing of the potential for forfeiture cannot be said to be in an arms length position,

and deserves little sympathy. Congress' intent in broadening the forfeiture law clearly applies to attorneys:

Fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds. . . . To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power.

This result is supported by a recent district court decision under the civil forfeiture statute. In *United States* v. One Parcel of Land, No. 85 C 4967 (N.D. Ill. July 8, 1985), the court found that it was without jurisdiction to exempt attorney's fees from forfeiture under that statute.

#### iii.) Sixth Amendment Considerations

The Sixth Amendment provides an equivalent right to both indigent and non-indigent defendants, the right to adequate assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). What the Sixth Amendment does not provide is a right of access to money for the purpose of hiring a lawyer. As the Court observed in United States v. Rogers, 471 F. Supp. 847 (E.D.N.Y. 1979), "[e]conomic realities impose one obvious limitation of the defendant's 'right' to be represented by a particular attorney." 471 F. Supp. at 851. Even more clearly, there is not constitutional right to use unlawfully obtained money for counsel. See United States v. Jeffers, 532 F.2d 1101, 1115 (7th Cir. 1976), rev'd in part on other grounds, 432 U.S. 132 (1977); United States v. Raimondo, 721 F.2d 476, 478 (4th Cir.), cert denied, 105 S.Ct. 133 (1984); United States v. Long, 654 F.2d 911, 915-17 (3d Cir. 1981); United States v. Bello, 470 F. Supp. 723, 725 (D. Col. 1979).

The Sixth Amendment does not give a defendant the right to pay his counsel with the proceeds of criminal activity. See United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, 105 S.Ct. 133 (1984) (jury reasonably could have found that assets transferred to lawyer as attorney's fees "retained their character as profits subject to forfeiture"); United States v. Long, supra, 654 F.2d at 916-17 (Government can restrain allegedly forfeitable property transferred to attorney as payment); United States v. Bello, supra, 470 F. Supp. at 725. See also United States v. Jeffers, supra, 532 F.2d at 1115. These cases comport with the relation-back principle embodied in the new statute.

Sixth Amendment claims historically have not prevented forfeiture or other seizures of assets designated for legal fees.

In United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979), the court upheld a restraining order entered pursuant to 18 U.S.C. § 1963 despite the defendant's contention that the order would deprive him from hiring an attorney and thereby violate his right to counsel. The court found that:

the proposed restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel if he has no means to hire an attorney.

The Government will not oppose an application by any defendant for court-appointed counsel if the defendant submits an affidavit showing an amount of unrestrained funds that would qualify him under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. Moreover the court in its discretion can appoint counsel of the defendant's choice to the CJA panel so that such counsel can be assigned to the case. See United States v. Ray, 731 F.2d 1361 (9th Cir. 1984) (no issue of right of counsel raised where

defendant whose assets are restrained obtained court-appointed counsel of choice).

In analogous cases, courts have refused to grant defendants a constitutional right to use money that, while belonging to the defendant, had been properly restrained. In United States v. Brodson, 241 F.2d 107 (7th Cir.), cert denied, 354 U.S. 911 (1957), the Government had levied a jeopardy assessment against the defendant and then, a year later, indicted him for income tax evasion. The Government then proceeded in the criminal case without resolving the jeopardy assessment. The defendant claimed that his right to counsel was being violated because the jeopardy assessment and accompanying tax liens had deprived him of funds for his defense in the tax evasion case. The district court dismissed the indictment, but the Seventh Circuit Court of Appeals reversed the dismissal and rejected the defendant's Sixth Amendment and Fifth Amendment claims.

Of direct relevance to this case, the court found that a defendant who had effectively been rendered indigent by the Government's action had no greater right to funds for his defense than any other indigent:

[c]ounsel . . . seek to make a distinction between a simple case of an indigent defendant and the case of a 'defendant who has been render indigent by the state [sic], who is kept in this position by the state's refusal to have the defendant's tax liability determined by a court of law, and who, while in this position, is faced with losing his freedom in criminal prosecution for tax fraud.' The distinction is without validity.

241 F.2d at 111. See also Illinois RediMix Corp. v. Coyle, 360 F.2d 848 (7th Cir. 1966) (defendant has no due process right to release of funds that are subject to federal tax liens for purpose of hiring counsel to defend jeopardy assessment against him): Lloyd v. Patterson, 242 F.2d 742

(5th Cir. 1957) (defendant has no right to release of tax liens for purpose of hiring counsel in suit contesting deficiency assessment).

Just as a defendant in a tax evasion case has no Sixth Amendment right to the release of tax liens to pay for his defense a defendant in CCE case has no right to the release of forfeited assets to hire counsel of his choice. Under the forfeiture law, all right, title and interest in property subject to forfeiture vests in the Government upon the commission of the act giving rise to the forfeiture. The filing of an indictment with forfeiture allegations represents a determination that there is probable cause to believe that all right to the property alleged to be forfeitable has already vested in the Government. Defense counsel's position, that their clients have a Sixth Amendment right to use such property for the purpose of hiring the best lawyer such money can buy, is completely unjustified.

Nonetheless, three cases interpreting the new statute have been troubled by its Sixth Amendment implications and have construed the statute to not reach attorney's fees, rather than confront the constitutional issue. See United States v. Ianniello, supra; United States v. Badalementi, supra; United States v. Rogers, supra. These cases have been troubled by two aspects of the potential forfeiture. First, they are concerned that defendants will not be able to obtain any counsel at all, even appointed counsel, because they will not be able to state that they are without funds. Second, they are concerned with the potential ethical problems for an attorney who must be concerned throughout his representation about the effect his own actions might have on his fees. The simple answer to both these questions is that an individual may hire counsel if he personally has funds-as opposed to funds for which the government has proper title-or he may have appointed counsel. Several of the defendants in the Reckmeyer case had appointed counsel and this court has

expressed its respect for them. The present operation of our legal system is premised on the adequacy of appointed counsel to represent any defendant. The Government recognizes its duty to pay for representation of defendants under the Criminal Justice Act; but disputes that it has an obligation to hire each defendant's counsel of choice, at fees several times the rate for appointed counsel.

Precisely this reasoning was applied by the court in United States v. One Parcel of Land, supra. The court found no Sixth Amendment violation when, as here, the defendant could have appointed counsel. See also In re Grand Jury Subpoena (Simels), supra, 605 F. Supp. at 849-850 n.14.

Those cases discussing the limited right to counsel of one's choice do not support the defense. These cases hold that the court cannot deprive the defendant of the assistance of chosen counsel by unreasonably denying continuances, see e.g., United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert denied, 439 U.S. 1069 (1979), or by disqualifying counsel absent sufficiently compelling reasons, see e.g., United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), cert denied, 104 S.Ct. 2154 (1984), or by forcing counsel upon a defendant who seeks to represent himself, see e.g., United States v. Babar, 567 F.2d 192, 203 (2d Cir.), cert denied, 434 U.S. 872 (1977). None of these cases suggests that the Constitution requires that the Government forego its statutory right to restrain a defendant's property solely because such restraints might make it more difficult for the defendant to hire a lawyer.

Once again, the Government urges that the proper resolution of this matter was reached in In re Grand Jury Subpoena (Simels), supra, 605 F. Supp. at 849-850 n.14. The court stated that defendants had no right to spend money which was not theirs on a lawyer, and that appointed counsel could adequately represent the defendant. In addition, the court found no constitutional violation sim-

ply because a defendant was deprived from hiring the "Rolls-Royce" of lawyers.

....

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-10-A

UNITED STATES OF AMERICA

CHRISTOPHER RECKMEYER (CAPLIN & DRYSDALE),

Defendant.

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 9 A.M. on November 8, 1985.

BEFORE:

THE HONORABLE JAMES C. CACHERIS, PRESIDING UNITED STATES DISTRICT

JUDGE

APPEARANCES:

For Caplin & Drysdale: For The United States:

Peter Lockwood Kent Robinson

#### PROCEEDINGS

THE COURT: I'll go ahead and take up the Caplin-Drysdale matter.

MR. LOCKWOOD: May it please the Court, my name is Peter Lockwood. I'm a member of the firm of Caplin and Drysdale. I understand from Your Honor's previous comments that you have read the briefs in this case.

THE COURT: Yes, sir.

MR. LOCKWOOD: So I will not repeat the matters dealt with in our brief.

The government has filed a timely response to our papers this morning, and there are some points made in there that I think bear addressing in this context together with sort of an overall point that I'd like to make here.

In a sense, the government's attitude in this case could be sort of summed up by a comment that Judge Bryan made when we moved to lift the temporary restraining order that was entered barring transfer of all of Christopher Reckmeyer's assets so that our fees could be paid during the pendency of this criminal case.

Unfortunately for us, our client had pleaded guilty the day before that hearing took place, so Judge Bryan determined that we would have to await the proceedings that are presently pending in front of Your Honor to raise this issue.

But in the initial stages, he said in response to my partner, Mr. Moyer, introducing himself and saying what he was here on, he said, you have violated one of the cardinal rules in representing a defendant, and that is to get your fee up front.

In fact, Your Honor, it wouldn't have made any difference in this case if we had gotten our fee up front, although the government attempts to set up a structure where they may imply that that's the case.

For openers, with respect to their standing argument, which is that we're just a creditor, I think it lies with ill grace in the mouth of the government to make that argument vis-a-vis Caplin and Drysdale when the only reason that Caplin and Drysdale is not in possession of its attorney's fees is that the government ex parte, at a time when they knew they were going to indict Mr. Reckmeyer, at a time when they knew Mr. Reckmeyer was represented by Caplin and Drysdale, got an injunction which barred Mr. Reckmeyer from spending any money on anything.

Indeed, the T.R.O. in this case covered things that were not sought to be forfeited in the indictment, specifically currency.

So under the government's approach to this matter, which I might add would apply in any criminal case in which there were forfeiture potentials, any drug case, C.C.E. case, R.I.C.O. case, the government comes in, gets an ex parte T.R.O., ties up all the defendant's assets, and then when the judge says, okay, you've got to come in under 853(N)(6) and litigate whether you're a bona fide purchaser without reasonable cause, says "gotcha," you know, you're a creditor, you didn't get paid your fees up front, you don't have any standing.

I think that frankly borders on being outrageous and certainly is not something that the Court should read this statute to permit the government to do, to not even give a lawyer his day in court on this issue.

With respect to the merits, Mr. Robinson, in a previous comment on the subject of in rem, in personam—which has been argued at some length, Your Honor. I'm not going to repeat it—said, well, everybody is relying on the in rem cases, there aren't any in personam cases.

I just want to assure the Court that I'm not relying on any in rem case. I'm distinguishing in rem cases, I may be implying that they're wrongly decided, but I am not relying on them.

I am relying on a couple of in personam cases cited in our brief, Rogers v. Enyello (phonetic), which were decided contrary to Mr. Robinson's assertions that there are no cases under that statute. These cases were under this statute, although I will concede they were not in an (N)(6) proceeding because they took place in the preliminary preconviction stage of the case and had to do with the whole issue of the T.R.O.

The real issue, Your Honor, is whether or not this statute will be interpreted by this Court in such a way as to permit the government, by accusation alone, to reduce a defendant prior to conviction to indigency, because that is the intent and reading of the statute they give.

Had we been paid our fees, under (N)(6) and the government's arguments, every dollar of them would still be forfeitable. We would be a third party. I believe the government concedes we are a bona fide purchaser, although that term as applied to a lawyer getting paid for legal work is not very felicitous. But they say we can never satisfy the burden of showing that we are without reasonable cause to believe that the proceeds are forfeitable.

Basically we agree with that. We don't think we could ever satisfy that. But we are representing this man in a criminal investigation and subsequently after an indictment. If we have to show that we have no notice that he's been accused by the government—

THE COURT: I understand your argument.

MR. LOCKWOOD: So our burden this morning—and I have to concede to some extent, I guess, it's a heavy burden—is to convince Your Honor that this statute is not intended to apply at all to our situation. We can't satisfy the (N)(6) burden, which is why we haven't asked for an evidentiary hearing.

The reason that we believe that the statute is not intended to apply, and I might add the reasoning adopted by the Courts in Rogers v. Enyello, is that the basic purpose of the forfeiture statute is to, as somebody else put it, deprive the defendant of his ill-gotten gains.

This is a criminal penalty. They can put labels on it about in personam forfeiture and attempt to bring to bear several hundred years of English legal history and stuff like that, but the fact of the matter is that the government

doesn't have any interest at all in Mr. Reckmeyer's property until after he's been convicted.

The relation back doctrine, under which the government could go back and collect legal fees, for example, paid to Caplin and Drysdale from the beginning of time practically, is a fiction. Why was it in the statute? As a fiction.

It was in the statute because there were sham transactions, transactions that weren't shams but were for less than fair market value. There were situations like what appeared to be presented in the Ray Mundo (phonetic) case when lawyers were not getting paid fees, they were being paid airplanes, the airplane happening to have been arguably used in drug dealings.

The congress decided that they didn't want to allow the defendant to retain any economic base, any assets, after a conviction for the enumerated offenses.

I suggest to Your Honor that if we get paid in this case, that's not going to create any economic base for Christopher Reckmeyer. And I don't understand the government to argue differently.

The government's argument really borders on simpleminded. I mean, they come in and they say, well, under the statute, Your Honor, it relates back to the time the offenses were committed so we are asking to get paid with the government's money.

Then they start arguing about under the criminal justice act, we wouldn't be entitled to be paid anything but minimal legal fees as though we were here under the C.J.A. making a fee application.

It wasn't the government's money.

THE COURT: I understand. Your time is almost up, sir.

MR. LOCKWOOD: The only other couple of points that I could address that relate specifically to the government's

brief here, Your Honor, are, number one, they suggest that we should be asked to carry a burden of proving that the forfeited assets of Christopher Reckmeyer represent our only chance of being paid legal fees.

If the government, with the plea agreement, the man in jail, and all its resources, represents to this Court that they don't think they have found all of Christopher Reckmeyer's assets, how do they think Christopher Reckmeyer's lawyers, bound by attorney-client privilege, are going to institute some sort of proceeding which is going to enable us to find assets that the government hasn't found? That's preposterous.

Secondly, because one of my partners in the initial claim filed in this case asserted that we didn't know until the indictment of the extent of the allegations about Mr. Reckmeyer's drug dealings, that that shows that we really didn't have any unique knowledge and basically that it would have been fine for us to have been removed from the case and brought new counsel in.

In fact, Mr. Reckmeyer was charged with and pleaded guilty to at least one tax count which was what we were hired to defend from the beginning. And secondly, as shown by the fee petition in our brief, most of the fees that were generated after the time for which we're seeking payment was because we were working with Mr. Reed, his counsel that was experienced in drug matters, because we had gotten a lot of familiarity about the financial—

THE COURT: Your time is about up. We've got a lot of people to hear. I'm going to take it under advisement. I've read your brief. Okay. Go ahead, Mr. Robinson.

MR. ROBINSON: Thank you, Your Honor. I'll just very briefly respond to just a few points.

First, the restraining order that was entered in this case was authorized by statute. All it really does is maintain the status quo until the rights of the third party can be determined. I think it's inappropriate to characterize that as the government badgering people on accusations alone. That's obviously not the purpose or the actual facts of what happened.

Secondly, I think it's inaccurate to say that it wouldn't have made a difference if Caplin and Drysdale got their fees up front. In fact, the government has not sought to forfeit the fees—

THE COURT: You all seem to question the reasonableness of the fees too, don't you?

MR. ROBINSON: Not with Caplin and Drysdale, Your Honor. That claim was raised with one of the other petitioners.

The only point I made about the amount of the fees was simply that I said that ultimately the question is not whether or not the government has to hire a lawyer for Christopher Reckmeyer. It's a question of how much they have to pay him. Congress has set out the amounts they think are appropriate.

THE COURT: Do you want to apply the criminal justice act rights to private lawyers?

MR. ROBINSON: I think that might be appropriate, Your Honor.

THE COURT: Well, then there's going to be a lot of lawyers on welfare around here if I start doing that.

MR. ROBINSON: Your Honor, I think those are concerns that Congress has to take into consideration. I think the question is what power the Court has gotten from Congress in this sort of a situation.

THE COURT: Some lawyers never handle a criminal case. They don't handle them at all. Some just never do it at all.

MR. ROBINSON: Of course, Your Honor, I understand that.

THE COURT: There may be a small number of the bar, a small percentage that get buried with this representation.

MR. ROBINSON: I understand the difficulties of the equities of the situation, Your Honor, but I think none-theless the question comes down to what Congress intended the Court to do and what Congress gave the Court the power to do.

THE COURT: All right.

MR. ROBINSON: And I think it's pretty clear that Congress did not write in an exception for attorney's fees in forfeitable property. And that really is the government's point, Your Honor.

THE COURT: All right. I'll give you one minute if you want to respond to that.

MR. LOCKWOOD: Nothing further, Your Honor. Thank you.

THE COURT: All right. Thank you.

(The above matter was concluded.)

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

#### CRIMINAL NO. 85-00010-A

UNITED STATES OF AMERICA

CHRISTOPHER F. RECKMEYER, II, et al. (Caplin & Drysdale Chartered, Petitioner)

#### ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

#### ORDERED:

- (1) that the Orders of Forfeiture of March 14, 1985, May 17, 1985, and June 5, 1985, are AMENDED to reflect that the firm of Caplin & Drysdale has a legal right, title, and interest in the sum \$170,512.99 out of the forfeited assets of Christopher Reckmeyer;
- (2) that the Clerk shall forward certified copies of this Order to all counsel of record.

Date: 3/27/86 Alexandria, Virginia United States District Judge

# SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK WASHINGTON, D.C. 20543

November 7, 1988

Mr. Peter Van N. Lockwood One Thomas Circle, N.W. Suite 1100 Washington, DC 20005

> Re: Caplin & Drysdale, Chartered, v. United States No. 87-1729

Dear Mr. Lockwood:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The case is set for oral argument in tandem with No. 88-454, United States v. Monsanto.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

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No. 87-1729

FILED

JAN 5 1989

NOSEPH F. SPANIOL, JR. CLERK

IN THE

### Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,

Petitioner.

V.

UNITED STATES OF AMERICA

# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

#### BRIEF FOR THE PETITIONER

\*Peter Van N. Lockwood Graeme W. Bush Albert G. Lauber, Jr. Julia L. Porter Robert L. Cohen

Caplin & Drysdale, Chartered One Thomas Circle, N.W. Washington, D.C. 20005 (202) 862-5000

\*Counsel of Record

550H

#### QUESTIONS PRESENTED

In 1984, Congress amended the forfeiture provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. (Supp. IV 1986) § 853, to include restraining order provisions and a "relation back" provision, vesting title to forfeited assets in the government upon commission of the underlying crime. This case presents the following questions:

- 1. Whether Congress in the 1984 amendments intended to authorize the restraint and forfeiture of assets sought to be paid to a lawyer in good faith by a criminal defendant as reasonable fees for the purpose of securing representation against the criminal charges upon which the proposed forfeiture is based.
- 2. If the first question is answered in the affirmative, whether the 1984 amendments are unconstitutional under the Sixth Amendment, by depriving the defendant of his qualified right to counsel of choice, or under the Fifth Amendment, by destroying the balance of forces between the government and the accused.

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#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1988

- No. 87-1729

CAPLIN & DRYSDALE, CHARTERED,

Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

#### OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-29a) is reported at 837 F.2d 637. The opinion of the court of appeals panel (Pet. App. 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (Pet. App. 81a-92a) is reported at 631 F. Supp. 1191.

#### JURISDICTION

The judgment of the court of appeals en banc was entered on January 11, 1988 (J.A. 9). On February 26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988. The petition was filed on that date and was granted on November 7, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, and the relevant provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. § 853, are set out in the appendix to the petition (Pet. App. 93a-103a).

#### STATEMENT

1. Congress enacted the Continuing Criminal Enterprise (CCE) statute in 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265, originally codified at 21 U.S.C. (1970 ed.) § 848. Since its enactment, the CCE statute has contained an in personam forfeiture penalty that is imposed as a part of the sentence of a defendant convicted of a CCE violation. The forfeiture extends to proceeds of the CCE violation and to any property affording an "interest in" or "source of influence over" the illegal enterprise (21 U.S.C. (Supp. IV 1986) § 853(a)(3)). The Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. (Supp. IV 1986) § 1963, contains similar forfeiture provisions.

Congress amended the forfeiture provisions of CCE and RICO in 1984 to enhance the government's ability to prevent defendants from evading the forfeiture penalty by transferring assets before conviction. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 2301, 98 Stat. 2192-2193 ("the 1984 Act"), codified at 21 U.S.C. (Supp. IV 1986) § 853. Three aspects of the 1984 Act are particularly relevant here. First, Congress amended the statutory restraining-order provisions to authorize a district court to issue ex parte orders, based solely on the indictment, restraining a defendant from transferring any asset alleged to be forfeitable. 21 U.S.C. (Supp. IV 1986) § 853(e)(1)(A). Second, Congress added a provision, com-

monly called the "relation-back" provision, that vests title to forfeitable assets in the government at the time of the criminal violation, thus permitting the government to seek forfeiture of assets subsequently transferred by the defendant to third parties. 21 U.S.C. (Supp. IV 1986) § 853(c). Finally, Congress provided that a third-party transferee of forfeitable assets can defeat forfeiture by proving at a post-conviction hearing that the transfer was a bona fide exchange for value and that he was, at the time of the transfer, "reasonably without cause to believe that the property was subject to forfeiture." Ibid.; see 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B).

Congress explained that the purpose of the 1984 Act was "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions." S. Rep. 98-225, 98th Cong., 2d Sess. 191, 200-201 (1984). Congress stated that the relation-back provision was aimed at "improper pre-conviction transfers" (id. at 196, 197) and at "improper disposition of forfeitable assets" (id. at 194). Noting that the 1984 Act "should not operate to the detriment of innocent bona fide purchasers of the defendant's property" (id. at 201), Congress explained that the exception for good-faith transferees "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (id. at 209 n.47). Referring to the amended restraining-order provision, the House Report stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt.1, 98th Cong., 2d Sess. 19 n.1 (1984).

2. Caplin & Drysdale, Chartered, was retained by Christopher Reckmeyer in the summer of 1983 in connection with a grand jury investigation in the Eastern District of Virginia (Pet. App. 4a). At the time Caplin & Drysdale undertook the representation, it believed the investigation to involve possible violations of the criminal tax laws. Eighteen months later, the investigation culminated in an

While this case concerns a CCE prosecution, the RICO forfeiture provisions are substantially identical to the CCE version, and the courts have interpreted them similarly. See Pet. App. 2a. For purposes of simplicity, we generally will cite only the CCE provisions.

indictment against Reckmeyer and 25 other individuals for 48 counts of tax and drug crimes (Pet. App. 82a; J.A. 28-40).

The indictment, handed down under seal on January 9, 1985, included a CCE count and sought forfeiture of virtually all of Reckmeyer's assets (Pet. App. 4a; J.A. 1). Specifically, the CCE count sought to forfeit "any profits" and any property affording "a source of influence over [the] enterprise, including but not limited to" a long list of assets (J.A. 33-40). That list contained generic descriptions of the assets to be forfeited, such as "any and all possessions" of Reckmeyer with a value in excess of \$1,000 (J.A. 37) and "any monies deposited by or on behalf of" Reckmeyer in any bank (J.A. 39).

On January 14, 1985, the day before the indictment was unsealed, the government sought and obtained an ex parte restraining order from the district court (J.A. 11-27). The order enjoined Reckmeyer from transferring or disposing of any assets listed in the indictment, specifically including any "currency" in excess of \$1,000 (Pet. App. 4a, 82a; J.A. 18, 23). The order likewise enjoined Reckmeyer from "removing from any checking or savings account" any "monies deposited" therein (J.A. 18, 25).

During the investigation preceding Reckmeyer's indictment, Caplin & Drysdale had tendered bills and been paid for its legal services at the standard hourly rates for the attorneys involved. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale \$26,445 for services rendered and costs incurred through that date (Pet. App. 82a; J.A. 67). The day before the indictment was unsealed, Caplin & Drysdale received two checks from Reckmeyer, each in the amount of \$5,000, in partial payment of amounts due on the outstanding bills (J.A. 67). These checks were deposited, but they subsequently were returned unpaid to Caplin & Drysdale because of the restraining order. On January 25, 1985, just prior to his surrender to authorities, Reckmeyer paid Caplin & Drysdale \$25,480 in cash (Pet. App. 39a; J.A. 67-68). The firm notified the district court

of its receipt of these funds, which were then deposited in a separate escrow account pending further order of the court (*ibid*.) At Reckmeyer's request, Caplin & Drysdale continued to represent him after the indictment (Pet. App. 39a; J.A. 68).

Reckmeyer subsequently filed a motion seeking modification of the restraining order to permit payment of attorneys fees (Pet. App. 82a; J.A. 43). On March 14, 1985, the day before the motion was to be heard, Reckmeyer pled guilty to three counts of the 48-count indictment, including the CCE count on which the forfeiture allegations were based (Pet. App. 82a). At the hearing the next day, the district court denied the motion for modification of the restraining order, citing Reckmeyer's guilty plea (J.A. 54-55). The court stated, however, that Caplin & Drysdale could raise the issue of forfeitability of attorneys fees, on its own behalf, in the context of a third-party petition against forfeited assets (ibid.). Reckmeyer was sentenced on May 17, 1985, to 17 years in prison without parole, and was ordered to forfeit virtually all his assets, including the cash held in escrow and the bank accounts on which the dishonored checks to Caplin & Drysdale had been drawn (Pet. App. 82a-83a; J.A. 62-63).

Caplin & Drysdale filed a claim in post-conviction proceedings under 21 U.S.C. (Supp. IV 1986) § 853(n) to an interest in the forfeited property in the amount of \$196,958 (J.A. 66-69). This sum represented the full amount owed to the firm for unpaid legal services rendered to Reckmeyer before and after his indictment, specifically including the \$25,480 in cash and \$10,000 in dishonored checks received in January 1985 (J.A. 69). The government conceded the reasonableness and legitimacy of Caplin & Drysdale's fees (J.A. 96), but argued that the "relation-back" provision vested prior title to Reckmeyer's assets in the government and prevented payment of any fees (J.A. 82-84).

The district court rejected the government's contention and ordered it to pay \$170,513 to Caplin & Drysdale out of Reckmeyer's forfeited assets (Pet. App. 92a). The court found that Caplin & Drysdale "was a good faith provider of services for value" (id. at 83a) and held that Congress had not intended the 1984 Act to encompass the forfeiture of bona fide attorneys fees (id. at 92a). A contrary interpretation of the statute, the district court concluded, would violate a defendant's Sixth Amendment rights by preventing him from retaining counsel of his choice (id. at 88a-92a). The interpretation urged by the government, the district court further concluded, would violate the Due Process Clause of the Fifth Amendment by creating conflicts between defense counsel and the criminal defendant that "would undermine the adversary system" (id. at 91a). In so holding, the court followed the rulings of other district courts, which similarly had concluded that "attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions." Id. at 86a (citing cases).

3. A panel of the Fourth Circuit unanimously affirmed, albeit on constitutional rather than statutory grounds (Pet. App. 41a-77a). While acknowledging that "a central concern behind the relation-back provisions was to void sham and fraudulent transfers" (id. at 49a), the panel concluded that the statutory language was not so narrowly confined (id. at 49a-51a); it accordingly ruled that the 1984 Act encompassed attorneys fees, even when paid in good faith and at arm's length (id. at 53a). The panel agreed with the district court, however, that this interpretation of the statute rendered it unconstitutional (id. at 70a):

[T]o the extent the Act authorizes freeze orders and forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the [S]ixth [A]mendment right to counsel of choice.

The panel acknowledged that the right to counsel of choice is "qualified" and must be balanced against countervailing government interests (id. at 66a-70a). But it concluded that the government's asserted interests—deterrence, preserving property for forfeiture, and depriving convicted persons of their economic power—did not outweigh "the primary right to representation by privately retained counsel of choice" (id. at 67a).

4. The Fourth Circuit granted rehearing en banc and. by a 7-4 vote, overturned the panel decision on the constitutional issues. The en banc court found no need to consider how the right to counsel of choice is "qualified," stating that this constitutional right "simply does not apply at all in the fee forfeiture context" (Pet. App. 11a). The majority stated that "[t]he right to counsel of choice belongs only to those with legitimate assets," and it concluded that a criminal defendant should be deemed to have no legitimate property, even prior to conviction, so long as "the government contests the legal ownership of the assets" (id. at 12a). This conclusion was founded on the statute's "relation-back" provision, which the majority analyzed as a property-law concept rather than as a punitive element of criminal in personam forfeiture. "[Ilf [a defendant] has no uncontested assets available for securing private counsel," the majority concluded, the availability of an appointed attorney is sufficient to satisfy his Sixth Amendment rights (id. at 14a).

The majority acknowledged that "[f]ee forfeiture does indeed raise many complex problems concerning access to defense counsel, the attorney-client privilege, and the resource needs of public defenders" (Pet. App. 19a). Having failed to discern any constitutional right at issue, however, the majority dismissed these concerns as mere questions of policy properly addressed to Congress (id. at 19a-22a). Indeed, the majority asserted that Congress had already discerned a "compelling public interest" in stripping defendants, in advance of trial and conviction, of "the ability to command high-priced legal talent" (id. at 21a).

#### SUMMARY OF ARGUMENT

I. Under the 1984 Act, restraint and forfeiture of a defendant's assets do not automatically follow from the prosecutor's charges or the issuance of an indictment. Rather, Section 853(e)(1) requires the government to apply to the district court for a restraining order or other relief. Accordingly, unless the district court acts as a mere rubber stamp, it rather than the prosecutor decides whether and to what extent a defendant should be restrained prior to conviction from using or transferring assets that the government alleges are forfeitable.

The statutory language vesting the district court with authority to issue a restraining order does not support so perfunctory a judicial role. On the contrary, the use of the permissive "may" in Section 853(e)(1) rather than the mandatory "shall" clearly evidences a Congressional intent to vest the district court with its traditional equitable discretion in deciding whether, and on what terms, to issue a restraining order. See United States v. Monsanto, 852 F.2d 1400, 1405 (2d Cir.), cert. granted, No. 88-454 (Nov. 7, 1988) (Winter, J., concurring). In accordance with traditional equitable standards, the district court must weigh the equities and competing hardships on the parties. Upon a comparison of the government's limited interests in obtaining a restraining order (i.e., to prevent the defendant from making lavish expenditures in anticipation of conviction and forfeiture, from executing fraudulent or sham transfers, and from using assets for criminal purposes) with the defendant's vital interests in having food, shelter, medical care, and defense counsel pending trial, the district court, as Judge Winter concluded in Monsanto, must invariably strike the balance so as to allow a defendant to continue making ordinary lawful expenditures, including those for bona fide attorneys fees. 852 F.2d at 1406-1409.

As Judge Winter further concluded, any funds paid in good faith to third parties in accordance with the district court's exercise of discretion under Section 853(e)(1) must not be subject to post-conviction forfeiture. This conclusion

follows from Congress's use of permissive language in Section 853(c), which states that assets transferred to a third party "may be the subject of a special verdict of forfeiture." This conclusion is likewise dictated by the "Catch-22" result that would occur if assets used by the defendant, with the district court's permission, to pay for legitimate living expenses and legal fees could subsequently be recaptured from the payees through post-conviction forfeiture. In order to vindicate its authority under Section 853(e)(1) to permit payments to third parties for necessities, the district court must exercise its discretion under Section 853(c) by declining to order the forfeiture of property it previously had authorized the defendant to transfer to an attorney or other third-party providers.

Petitioner submits that this Court should adopt Judge Winter's construction of the statute in Monsanto. Although the Act does not expressly exempt attorneys fees from forfeiture, it does not follow that such fees (or the funds needed to pay them) should or must be forfeited. Both the statute's language and its legislative history indicate that Congress intended to leave the district court with its full equitable discretion in deciding whether to issue a restraining order and, if so, the scope of such order. As Judge Winter concluded, a proper balancing of the hardships dictates that whatever assets are needed by the defendant to make ordinary and necessary living expenditures, including those to retain private defense counsel, must be exempted from a post-indictment restraining order and immunized from post-conviction forfeiture.

II. This Court has often held that statutes should be construed where possible to avoid decision of serious constitutional questions. This canon of construction is particularly apposite here. If the 1984 Act is read to permit the government to render a defendant indigent upon indictment, unable to defray either his necessary living expenses or the cost of a legal defense, the statute would be unconstitutional under the Fifth and Sixth Amendments.

This Court recently reaffirmed that an accused has a "Sixth Amendment right to choose [his] own counsel."

Wheat v. United States, 108 S.Ct. 1692, 1697 (1988). When considering the validity of government-imposed restrictions on this constitutional right, the Court has balanced the defendant's interest in retaining a particular lawyer against the government's countervailing interests, including its interest in maintaining the fair administration of justice. The Court has not previously considered a situation, such as this one, in which the government seeks to deprive a defendant of the ability to retain private counsel of any kind.

Applied in the present context, the balance of interests plainly favors the defendant. On the one hand, the government has no substantial interest in disabling the defendant from paying legal fees and other living expenses pending trial, since the funds used to pay such expenses would not, in the normal course of events, have been available for forfeiture at the time of conviction. Moreover, since the government will have to pay for court-appointed counsel for the defendant in any event, the only benefit to the government from preventing retention of private counsel will be the marginal difference between the cost of such retained counsel and the lesser cost to the government of appointed counsel. Such a financial benefit is neither a purpose of the 1984 Act nor a substantial governmental interest. On the other hand, the interference with the defendant's ability to hire counsel is complete. No defendant subject to a broad forfeiture claim, such as the claim in this case, will be able to pay (or assure payment to) a lawyer. He will thus be prevented, not just from hiring a particular lawyer, but from hiring private defense counsel of any kind. Such an extreme restriction on a defendant's right to retain counsel of choice, in the absence of any substantial countervailing governmental interest, clearly violates the Sixth Amendment.

The forfeiture of attorneys fees would also violate the Due Process Clause of the Fifth Amendment by destroying the "balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474 (1973). Simply by appending a forfeiture count to a CCE or RICO

indictment, a prosecutor would enjoy the "ultimate tactical advantage of being able to exclude competent defense counsel as he chooses." United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985). "Given the potential for prosecutorial abuse or manipulation," the district court below concluded (Pet. App. 91a), "such a veto power over the defendant's choice of counsel is clearly intolerable." Furthermore, by shifting the defense of complex CCE and RICO cases to already overburdened court-appointed attorneys and public defenders, the government will, through the exercise of prosecutorial discretion concerning forfeiture charges, be able to increase substantially the likelihood of obtaining convictions by eliminating the experience, talent and investigative resources of the private defense bar. The creation of such an imbalance of powers between the government and criminal defendants severely undermines our adversary system of justice and violates the Fifth Amendment.

### ARGUMENT

I. THE STATUTE MUST BE INTERPRETED TO PERMIT A DEFENDANT TO PAY HIS ORDINARY AND NEC-ESSARY LIVING EXPENSES, INCLUDING REASON-ABLE ATTORNEY'S FEES, PRIOR TO THE CONCLUSION OF TRIAL

The Fourth Circuit's decision in this case effectively destroys the ability of a CCE or RICO defendant to retain private counsel. In any case, such as this one, where the indictment alleges forfeitability of substantially all the defendant's assets, and the district court issues a restraining order coextensive with those forfeiture allegations, the defendant for practical purposes is instantly reduced to indigency. Absent some means of freeing a portion of his or her assets to pay a lawyer and to provide for other necessary living expenses, such a defendant will be unable to retain private counsel and will otherwise be required to live, at least through the completion of trial, on public or private charity.

The fundamental issue presented here is whether the forfeiture provisions must be read, as the government con-

tends and the Fourth Circuit held, to empower a prosecutor, by unproven allegations in an indictment, to beggar a defendant in this way. In his concurring opinion in United States v. Monsanto, 852 F.2d 1400, 1405 (2d Cir. 1988), cert. pending, No. 88-454, Judge Winter convincingly explained why the government's reading of the statute is incorrect. Judge Winter's approach is faithful to the language and legislative history of the forfeiture provisions. and it is consonant with the principles that have traditionally guided courts of equity. His approach protects the legitimate interests of defendants prior to the conclusion of trial, without compromising Congress's objective of preventing the dissipation of assets that would be available for post-conviction forfeiture in the normal course. Not least significantly, his approach avoids decision of difficult constitutional questions that would otherwise have to be reached.

# A. A District Court Must Apply Normal Equitable Principles In Determining Whether, And On What Terms, To Grant A Post-Indictment Restraining Order

The threshold question addressed by the Fourth Circuit en banc was "whether the [statute] permits the forfeiture of attorneys' fees" (Pet. App. 5a). Finding no explicit exemption for such fees, the court had no difficulty in answering this question affirmatively. But the court got to the wrong result because it began with the wrong question. The question it should have asked is whether the statute also permits a district court to deny the government's request to restrain and forfeit all of a defendant's assets, and instead to restrain only those assets not needed to defray the defendant's ordinary and necessary living expenses, including reasonable attorneys fees, prior to the conclusion of trial. The language and legislative history of the statute clearly show that the district courts possess such discretion and that they must exercise it according to traditional principles of equity.

1. The post-indictment restraint provision of the CCE statute, 21 U.S.C. (Supp. IV 1986) § 853(e)(1)(A), entitled "Protective orders," provides in pertinent part as follows:

Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property \* \* \* for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation \* \* \* for which criminal forfeiture may be ordered \* \* \*.

This language plainly gives the district court discretion to decide whether or not to grant a restraining order, as well as to decree the terms on which any order shall issue. The statute lists "restraining order[s]" as but one permissible remedy, authorizing the court alternatively to require a "performance bond" or "take any other action." More fundamentally, the statute uses the permissive word "may" rather than the mandatory terms "must" or "shall." This shows beyond peradventure that Congress intended to vest the court with discretion to formulate appropriate equitable relief. See, e.g., United States v. Rodgers, 461 U.S. 677, 706 (1983); 2A Sutherland Statutory Construction § 57.03 at 643 (4th ed. 1984) (the form of verb used in a statutory provision is the single most important textual consideration in determining whether the provision is mandatory).2

<sup>&</sup>lt;sup>2</sup> Even where Congress has used mandatory terms like "shall" or "must," this Court has hesitated to conclude that courts of equity lack discretion to fashion appropriate relief. For example, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court construed as permissive a provision in the Emergency Price Control Act stating that, upon a proper showing of a violation by the Secretary, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The district court had found that violations had occurred, but had refused to issue an injunction because the violations were inadvertent and the defendant had taken remedial action. This Court upheld the district court's action, concluding that the phrase "shall be granted' is less mandatory than a literal reading might suggest" (321 U.S. at 328). The Court found support for its conclusion both in the language of the statute, which authorized "other order[s]" as well as injunctive

The conclusion that district courts retain discretion under Section 853(e)(1) to define the appropriate contours of a post-indictment restraining order comports with the precept that "[t]he ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions." United States v. Thoman, 156 U.S. 353, 359 (1895). This conclusion is likewise consistent with the established canon that courts retain their full equitable powers absent a clear statement of contrary legislative intent. As this Court stated in Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946):

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. \* \* It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest.

Accord, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"); Yakus v. United States, 321 U.S. 414, 441 (1944).3

relief, and in the legislative history, which stated that a court was "to issue whatever order to enforce compliance is proper in the circumstances of each particular case" (id. at 329 (citation omitted)). "A grant of jurisdiction to issue compliance orders," the Court concluded, "hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made" (ibid.).

3 These cases exemplify a long line of decisions affirming the principle that federal courts retain the full scope of their equitable discretion 2. This Court's decisions make clear that a district court, in exercising its equitable discretion, must evaluate the balance of hardships as between the competing parties. In Weinberger v. Romero-Barcelo, supra, the Court reviewed the well-established principles governing the award of equitable relief in federal courts. At the outset, the Court noted that an injunction, as an equitable remedy, should not issue as a matter of course. 456 U.S. at 312 (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975)). Where the litigants present competing claims of injury, the court must balance those claims and consider the effect on each party of granting or withholding the requested relief. Weinberger, 456 U.S. at 313 ("The traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims.").4

Even if the relative hardships tip decidedly in favor of issuing a restraining order, the court is not obligated mechanically to grant the full relief requested. Rather, the court must exercise its discretion and tailor the scope of the remedy to fit the situation before it. "A basic principle

unless Congress expressly acts to restrict it. See, e.g., Amoco Production Co. v. Village of Gambell, 107 S. Ct. 1396, 1403 (1987) ("An injunction was not the only means of ensuring compliance with the Act and we found nothing in the Act's language and structure or legislative history which suggested that Congress intended to deny courts their traditional equitable discretion."); United States v. Rodgers, 461 U.S. 677, 707-708 (1983) ("reading 'may' as either conferring or confirming a degree of equitable discretion conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion"); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16-17 (1971); Mitchell v. Robert De Mario Jewelry, 361 U.S. 288, 290-291 (1960).

'Accord, e.g., Yakus v. United States, 321 U.S. 414, 440 (1944) (a court of equity must "balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction"). See also Amoco Production Co. v. Village of Gambell, 107 S. Ct. at 1402; Sampson v. Murray, 415 U.S. 61, 88 (1974); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-507 (1959); Hecht Co. v. Bowles, 321 U.S. at 329.

of the law of equitable remedies \* \* \* is that the relief granted should be no broader than necessary to cure the effects of the harm caused." Soltex Polymer Corp. v. Fortex Industries Inc., 832 F.2d 1325, 1329 (2d Cir. 1987). The authority to narrow or limit the scope of relief—by reference, among other things, to the balance of hardships between the parties—is inherent in the district court's power to do equity.

3. Nothing in the legislative history of the 1984 Act suggests that Congress intended to preclude a district court from exercising normal equitable powers in deciding whether, and on what terms, to issue a post-indictment restraining order under Section 853(e)(1)(A). To the contrary, the Senate Report explicitly states that the identical language now contained in 18 U.S.C. (Supp. IV 1986) § 1963(d)(1)(A) "does not exclude " " the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper." S. Rep. 98-225, 98th Cong., 2d Sess. 191, 203 (1984). Congress emphasized that "at such a hearing the court is not to entertain challenges to the validity of the indictment," and that "the probable cause established in the indictment \* \* \* is to be determinative of any issue regarding the merits of the government's case." Id. at 203. But the Report specifically states that "the court may consider factors bearing on the reasonableness of the order sought." Id. at 202.

The only factor other than the merits of the government's claim to the allegedly forfeitable assets that might bear on the "reasonableness" of a post-indictment restraining order is its effect on the parties, including the hardship potentially imposed on the defendant. As Judge Winter wrote in *Monsanto*, 852 F.2d at 1406:

It seems almost self-evident that if the purpose of the hearing is not to test the government's evidence of criminality, then its purpose must be to allow an informed balancing of the relative hardships on the parties according to traditional principles of equity.

The legislative history thus demonstrates that a court faced with a request for a post-indictment restraining order cannot "look behind" the indictment to question the government's likelihood of prevailing as to forfeiture. But the court must still apply traditional equitable factors—including an inquiry into the relative hardships on the parties—in determining the "reasonableness" of the relief sought. And the court must make this inquiry both at the ex parte proceeding in which the government initially requests a restraining order, and at any subsequent hearing in which the defendant requests that an existing order be modified.

see Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. at 16 (nature of violation determines scope of equitable remedy); Brown v. Board of Education, 349 U.S. 294, 300 (1955) ("Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."); Eccles v. Peoples Bank, 333 U.S. 426, 431 (1948) ("It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."); Hecht Co. v. Bowles, 321 U.S. at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to \* \* \* mould each decree to the necessities of the particular case."); United States v. Morgan, 307 U.S. 183, 194 (1939).

In the case of restraining orders sought before the filing of an indictment, Section 853(eX1XB) instructs the district court to determine, not only whether "there is a substantial probability that the United States will prevail on the issue of forfeiture." but also whether "the need to preserve the availability of the property \* \* \* outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. (Supp. IV 1986) § 853(e)(1)(B)(i) & (ii). This specific statutory reference to hardship in the case of pre-indictment restraining orders by no means suggests that hardship, much less irreparable harm, is irrelevant to a district court's decision as to the appropriate scope of a post-indictment restraining order. The handing down of an indictment containing forfeiture counts makes it unnecessary for a court to consider whether there is a "substantial probability that the United States will prevail on the issue of forfeiture." But the indictment imports no more than a finding of probable cause; it thus has no effect on the other equitable factors-such as the balance of hardships between the

4. In sum, both the plain language of the statute and its legislative history show that Congress intended in Section 853(e)(1)(A) to confer discretionary power, and not to impose an absolute and mechanical duty on the district courts. A court therefore is not required to issue a restraining order coextensive with the forfeiture allegations of an indictment. Instead, the court must employ traditional equitable principles to formulate relief responsive to the legitimate needs of the parties before it. Indeed, we do not understand the government seriously to contest this point. In his petition for writ of certiorari in Monsanto, the Solicitor General acknowledged that "[t]he word 'may' in Section 853(e)(1)(A) \* \* \* permit[s] the court to exercise some equitable discretion in determining whether to continue a restraining order \* \* \* or instead to vacate or modify the order to grant the defendant access to the assets pending [the] outcome [of the trial]." U.S. Pet. in No. 88-454, at 21 n.16. And the government has made the same concession in the lower courts. See, e.g., Brief for the United States at 17 n.4, United States v. Fischer, 833 F.2d 647 (7th Cir. 1987) ("It is clear that a district court retains some discretion in deciding whether to issue a restraining order" because the statute "provides only that the court may issue a restraining order based on the indictment") (emphasis original).

parties—that a court would normally consider in determining whether to grant equitable relief. Indeed, if a court faced with a request for a post-indictment restraining order could consider neither the government's probability of success nor the hardships between the parties, there would be nothing for it to do at all. Such a result—converting the district court into a rubber stamp—would be completely at odds with Congress's clear statement that the grant of a post-indictment restraining order is discretionary and that "the court may consider factors bearing on the reasonableness of the order sought." S. Rep. 98-225, supra, at 202.

B. Under A Proper Balancing Of The Equities, A District Court Must Ensure That A Post-Indictment Restraining Order Does Not Deprive The Defendant, Prior To The Conclusion Of Trial, Of The Ability To Pay Ordinary And Necessary Living Expenses, Including Reasonable Attorneys Fees

When the government seeks a restraining order under Section 853(e)(1)(A), the district court must assume that the government will likely prevail on its forfeiture allegations. Where the defendant has substantial assets subject to forfeiture, therefore, the balance of hardships typically will indicate that a restraining order of some kind should issue. But the balance of hardships will likewise dictate that the order, if issued, not disable the defendant from defraying normal living expenses-including food, shelter, medical expenses, and attorneys fees-prior to the verdict at trial. Until he is adjudged guilty beyond a reasonable doubt, the defendant has a strong, obvious and legitimate interest in not being rendered indigent, unable to purchase the bare essentials of life or to mount a legal defense against the very charges upon which the restraining order is based. And the government has no cognizable interest in preventing a defendant from paying for these necessities, since their payment will not deplete the estate of any assets that, in the normal course of events, would have been available for forfeiture at the time of conviction.

## 1. The defendant will suffer irreparable injury if he is rendered indigent before he is proven guilty

a. In any case involving a government request to restrain the use of allegedly forfeitable assets, the hardship on the defendant will obviously depend upon the scope of the government's request and the defendant's personal situation. It goes without saying that a defendant will suffer no legally cognizable hardship if he is prevented from making unlawful expenditures, from concealing his property, or from transferring his assets to evade forfeiture. A defendant will likewise have no legitimate interest in dissipating his potentially-forfeitable estate by indulging in an extravagant lifestyle. And even where life's necessities are

concerned, the defendant cannot reasonably insist on paying for them out of allegedly-forfeitable assets, if he has at his disposal other property, not subject to forfeiture, by which those expenses may be discharged.<sup>7</sup>

On the other hand, hardship to the defendant will be at its apogee where—as in this case—the government alleges that virtually all of the defendant's assets are forfeitable and then seeks a restraining order coextensive with those allegations of the indictment. A defendant subject to such an order effectively becomes a pauper. Absent public welfare or private charity, he will be unable to obtain food, medical care, and other necessities during the period between indictment and conclusion of trial. Moreover, such an all-encompassing order will completely eliminate his ability to retain defense counsel of his choice—a right of constitutional dimension—since he will be unable to pay or assure payment to a lawyer.

In short, it seems incontestable that a defendant will suffer irreparable harm if he is rendered indigent before he is tried. We have discovered no case in which a federal court, exercising its equitable powers, has completely deprived a defendant of the ability to defray ordinary and necessary living expenses, based solely on a third party's unproven claim to his property. Indeed, the government

in the lower courts has acknowledged that a restraining order may be modified to permit payment of customary living expenses out of potentially-forfeitable assets, provided the defendant can show that he has no other funds at his disposal. See Brief for the United States at 19-24, United States v. Fischer, 833 F.2d 647 (7th Cir. 1987).

b. Certain of the dissenters in *Monsanto*, while conceding that a post-indictment restraining order "brings a trial court's traditional equity powers into play," contended that a distinction should be drawn, in terms of hardship to the defendant, between the costs of a defense and other necessities of life. 852 F.2d at 1414 (Mahoney, J., dissenting). As Judge Mahoney put it:

It is one thing to conclude that a district court might, in a given case, allow the invasion of re-

Inc., 689 F.2d 94, 99 (6th Cir. 1982) (pretrial restraining order in civil RICO action barred transfer or dissipation of the defendant's personal and real property, but provided that he "shall in no way be prohibited from conducting normal, day-to-day business activities, and the payment of trade payables not in excess of \$5,000 each"); United States v. Ianniello, 644 F. Supp. 452, 459 (S.D.N.Y. 1985) (restraining order modified to extent of releasing earnings as were necessary to allow defendant to pay for necessities of life, including attorney's fees). See also United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987) ("The defendant's interest in having access to funds needed to pay ordinary and necessary living expenses until the conclusion of trial \* \* \* must be balanced against the government's interest in preventing the depletion of potentially forfeitable assets."). The cases permitting forfeiture of assets sought to be used for counsel fees or other necessities have based their holdings on the erroneous conclusion that the district courts lack discretion to do otherwise. See, e.g., United States v. Nichols, 841 F.2d 1485, 1491-1496 (10th Cir. 1988); Pet. App. 5a-7a. The Seventh Circuit has approached this problem by a different route, holding that the 1984 Act violates a defendant's Fifth Amendment procedural due process rights because it does not guarantee a post-indictment hearing at which the government has the burden of proof before restraining assets needed to pay attorneys fees. United States v. Moya-Gomez, 860 F.2d 706, 729-730 (7th Cir. 1988), Accord, United States v. Monsanto, 852 F.2d at 1411-1412 (Miner, J., concurring in part and dissenting in part); id. at 1418-1420 (Cardamone, J., concurring in part and dissenting in part).

<sup>&</sup>lt;sup>7</sup> If a defendant with property not subject to forfeiture does make expenditures out of forfeitable property, the statute authorizes the forfeiture of substitute property of equivalent value. 21 U.S.C. (Supp. IV 1986) § 853(p).

<sup>\*</sup>The restraining order in this case, which was coextensive with the forfeiture allegations of the indictment, covered "any and all possessions" of Reckmeyer, including currency, with a value in excess of \$1,000, as well as "any monies deposited by or on behalf of" Reckmeyer in any bank. J.A. 18, 23, 25, 37, 39.

<sup>&</sup>lt;sup>9</sup> On the other hand, there are a number of cases in which courts have modified restraining orders to release funds needed by a defendant to pay for life's necessities, including the cost of legal defense. See, e.g., United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) (exempting from restraining order expenditures for the necessities of life for the defendant and his wife); USACO Coal Co. v. Carbomin Energy.

strained assets to pay a grocer's bill, or provide emergency surgery. It is quite another to conclude that the statute authorizes the rather massive financial outlays often necessary to pay private defense counsel in RICO and CCE prosecutions.

This attempted dichotomy between legal fees and other living expenses finds no support in the language or legislative history of the statute. First, as Judge Winter observed, the statute's plain language refutes the suggested distinction, since "there is nothing in the [1984 Act] that exempts attorney's fees from the exercise of [the court's] traditional equity powers." Monsanto, 852 F.2d at 1409. Indeed, since the right to counsel of choice has constitutional dimension, Congress can hardly be thought to have singled out attorneys fees for worse treatment than other living expenses would receive. Congress was well aware that RICO and CCE cases are usually complicated and thus expensive to try. 10 Yet Congress explicitly stated, referring to the restraining-order provision, that "Inlothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt. 1, 98th Cong., 2d Sess. 19 n.1 (1984).

Second, there is no reason for a court of equity to discriminate, on grounds of cost, against the necessity of a criminal defense. "So far as cost is concerned," Judge Winter observed, "a surgeon of one's choice may be as expensive as a lawyer of one's choice." Monsanto, 852 F.2d at 1408-1409. A court of course must ensure, as it would do in any other context, that the attorney's proposed fee is bona fide and reasonable in amount. But there is no basis for contending that the legitimate costs of a criminal defense are any less "ordinary and necessary" than the expense of a defendant's room, board, and medical care.

Finally, there is no reason for a court of equity to discriminate against the cost of legal representation on grounds of hardship. A defendant rendered indigent by a post-indictment restraining order may qualify for a courtappointed lawyer under the Criminal Justice Act. But he may also be able to satisfy his need for food by qualifying under the Food Stamp Act, his need for surgery by qualifving under the Medicaid Act, and his need for shelter by qualifying for publicly-assisted housing. It cannot seriously be contended that the existence of these other welfare programs eliminates the hardship of forced indigency. There is no greater basis to contend that the availability of court-appointed counsel eliminates the hardship of being prevented, by the unproven allegations of an indictment, from exercising one's Sixth Amendment right to hire the counsel of one's choice.

# 2. The government will suffer no legally cognizable hardship if a defendant is permitted to pay ordinary living expenses prior to an adjudication of guilt

In seeking a post-indictment restraining order, the government's objective is to ensure that the defendant does not dissipate potentially forfeitable assets. This governmental interest will normally be satisfied by issuance of a restraining order covering the bulk of the defendant's property. The narrow question here is whether the government suffers any meaningful hardship if the restraining order, instead of covering all the defendant's assets, exempts whatever funds are needed to pay normal living

<sup>10</sup> See, e.g., Forfeiture in Drug Cases: Hearings before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 52-55, 59 (1981) ("House Hearings") (statement of ABA representative Stephen Horn). The legislative history is replete with references to the so-called "Black Tuna" case, in which several million dollars' worth of assets were subject to forfeiture, yet because of dissipation by the defendant, and because of a court order setting aside over \$500,000 for the payment of attorneys fees, the government ultimately obtained forfeiture of only \$16,000. See, e.g., H.R. Rep. 98-845 Pt. 1, 98th Cong., 2d. Sess. 3 (1984); House Hearings, supra, at 53. But there is no suggestion in these passages that Congress disapproved of the payment of a defendant's legitimate attorneys fees. To the contrary, "[t]he only policy concern expressed [by Congress was] that 'a considerable amount of the "proceeds" of this drug operation are elsewhere, probably funding future "Black Tunas." ' " Monsanto, 852 F.2d at 1408 n.2 (Winter, J., concurring) (quoting H.R. Rep. 98-845 Pt. 1, supra, at 3). That statement, obviously, could not apply to legitimate attorneys fees.

expenses and legal fees during the relatively short period between indictment and conclusion of trial.

It is of course true that the government, upon conviction, will recover marginally fewer dollars if the defendant has been allowed to use potentially-forfeitable assets to pay for legal services and other necessities pending trial. But there is nothing in the 1984 Act or its legislative history that identifies "revenue raising," without more, as an objective of criminal forfeiture. Indeed, the government expressly disclaimed such an interest in *Monsanto*. See 852 F.2d at 1407 (Winter, J., concurring). Thus, as Judge Winter properly concluded in that case, "[t]he mere fact that the assets ultimately forfeited after conviction may be less than if a total preconviction restraint had been imposed does not " contravene any purpose of the Act" (ibid.).

In assessing hardship on the government, rather, the inquiry must focus on the government's ability to achieve the objectives explicitly posited by Congress in enacting the 1984 forfeiture amendments. The legislative history identifies two major goals: to destroy the "economic power base" of organized crime and to "preserve the availability of a defendant's assets for criminal forfeiture." S. Rep. 98-225, supra, at 191, 196. Neither of these objectives is compromised by allowing a defendant to defray ordinary and necessary living expenses pending trial.

a. Congress's first objective in the CCE and RICO forfeiture provisions was to remove the economic benefit of crime by imposing a criminal forfeiture penalty on convicted persons. The significance of this deterrence interest, however, is severely constrained in the pre-conviction context by the due process prohibition on the imposition of punishment prior to conviction. See United States v. Salerno, 107 S. Ct. 2095, 2101 (1987); Bell v. Wolfish, 441 U.S. 520, 535-537 (1979). At the time a restraining order is issued, the government's claim to allegedly illicit assets is conditional, since its ownership therein cannot vest until the outcome of the criminal trial. As Judge Winter wrote in Monsanto: "There is nothing in the language or the legislative history of the Act indicating that Congress hoped to eradicate criminal organizations before conviction and forfeiture" (852 F.2d at 1407 (emphasis original)).

The significance of Congress's general penal objective is even further diminished when the funds in question, if not forfeited to the government, will be paid to third parties in exchange for the necessities of life and the costs of defense. Those funds will then be removed in any event from the convicted defendant's "economic power base" (S. Rep. 98-225, supra, at 191), and the general penal goal of forfeiture will be achieved. The defendant, of course, may prove a more effective adversary if he is allowed to pay his grocer, his doctor, and his lawyer prior to the conclusion of trial. But that is not a "hardship" of which the government may legitimately complain. 13

With respect to legal services, the marginal cost to the government will be the difference between the reasonable fees of retained counsel and the cost of appointed counsel, since both the government and the Fourth Circuit agree that a defendant constructively rendered indigent by a restraining order is entitled to representation under the Criminal Justice Act. See Pet. App. 9a.

<sup>&</sup>lt;sup>12</sup> Notwithstanding the "relation back" provision of the statute, the government will not obtain title to the allegedly forfeitable property unless and until the defendant is actually convicted. See 21 U.S.C. (Supp. IV 1986) § 853(a) & (c).

Congress did not intend to punish defendants prior to conviction by depriving them of the ability to hire especially qualified lawyers. As noted in the text, this Court has squarely held that the Fifth Amendment prohibits the imposition of punishment before conviction. Bell v. Wolfish, 441 U.S. at 535-537. Nor does the ability to retain counsel of one's choice—or to pay for food and shelter prior to trial—constitute an aspect of "undeserved economic power" (Pet. App. 21a). As the Fifth Circuit stated in Thier:

Expenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel to prove his innocence or protect his procedural rights should not be considered incentives to crime. The notion that a defendant would commit criminal acts to accumulate monies

b. Congress's second objective in the 1984 Act was to preserve assets for potential forfeiture by preventing defendants from depleting their estates. But as Judge Winter explained in *Monsanto*, "[t]he 'depletions' with which Congress was concerned were \* \* only those that enable a defendant to avoid the economic impact of a post-conviction forfeiture" (852 F.2d at 1407 (emphasis original)). Expenditures made to defray ordinary and necessary living expenses "do not enable a defendant to avoid the economic impact of a post-conviction forfeiture, because such expenditures would have been made without regard to the prospect of such a forfeiture" (id. at 1407-1408 (Winter, J., concurring)).

Congress explained that the 1984 Act was designed "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions." S. Rep. 98-225, supra, at 200-201. Congress repeatedly voiced concern about "defendants defeating forfeiture by removing, transferring, or concealing their assets" (id. at 195) and "shield[ing] them from " " forfeiture" (ibid.). Congress stated that the relation-back provision was aimed at "improper pre-conviction transfers" (id. at 196, 197) and at "improper disposition of forfeitable assets" (id. at 194). And Congress explained that the exception for good-faith transferees "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (id. at 209 n.47).14

or property in order to pay for necessary food, clothing and shelter while he is being tried or in order to pay a reasonable attorney fee to the attorney he chooses to assist in his defense is sophistry.

801 F.2d at 1474-1475. Or, as Judge Logan put it somewhat more colorfully, dissenting in *United States v. Nichols*, 841 F.2d 1485, 1512 (10th Cir. 1988): "[E]quating the ability to raise a defense to a 'benefit' of crime is like considering the right to a jury trial a benefit of being accused of murder."

Read as a whole, the Act's legislative history shows that Congress wanted to prevent defendants from evading or defeating forfeiture by disposing of assets that would normally have been available for forfeiture at the time of conviction. This goal is obviously served by preventing a defendant from making unlawful expenditures, concealing his assets, or engaging in fraudulent conveyances. It is likewise served by preventing lavish and extravagant expenditures designed to accelerate consumption into the pretrial period, and by preventing gratuitous transfers to friends or relatives for purposes of concealment and later use. As Judge Winter concluded, however, "[p]reventing ordinary lawful expenditures \* \* \* does not serve any purpose of the Act," since such expenditures do not deplete the defendant's estate of any property that, in the normal course of events, would have been in his possession at the conclusion of trial. Monsanto, 852 F.2d at 1408 (emphasis added).15

the legislative history of the 1984 Act. As early as 1980, Senator Biden identified as a principal difficulty with current law "the dissipation of assets once the \* \* \* parties being investigated had become aware that they are under investigation." Forfeiture of Narcotics Proceeds: Hearings before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary, 96th Cong., 2d Sess. 104 (1980). When introducing proposed legislation in March 1982, the Justice Department stated that existing law did not "provide adequate mechanisms for dealing with the problem of defendants defeating forfeiture by transferring, removing, and concealing their forfeitable property so that it may no longer be reached by the Government at the time of conviction." House Hearings, supra, at 156 (testimony of Deputy Associate Attorney General Jeffrey Harris). The Justice Department stated that its proposed relation-back provision "should discourage the practice of defendants engineering sham transfers of their property to associates and relatives in an attempt to defeat forfeiture" (id. at 167). Because Congress's principal concern was to prevent defendants from fraudulently defeating forfeiture, many lower courts, including the district court below, reasonably concluded that Congress did not intend the 1984 Act even to apply to legitimate attorneys fees. See Pet. App. 88a; United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

18 Although Congress did not explicitly address the question of a

<sup>14</sup> The goal of preventing improper pre-conviction transfers pervades

In sum, Congress's objective of "preserving assets for forfeiture" simply does not extend to assets that would have been consumed prior to the conclusion of trial in the ordinary course of events. Thus, the only detriment that the government suffers when a restraining order exempts assets needed to pay legal fees and other living expenses is a fiscal one. This fiscal detriment is equal to the difference between the cost to the government of having the defendant fed, sheltered, represented and doctored at public expense, and the amount that the defendant must pay to secure these necessities privately. But because the government concedes that revenue raising, without more, was not among Congress's objectives in the 1984 Act, this modest fiscal detriment is not a cognizable "hardship" for purposes of the restraining-order calculus.

## C. Assets That Have Or Should Have Been Exempted Under A Properly-Entered Restraining Order Must Be Immunized From Forfeiture Upon Conviction

We have shown above that a district court, upon properly balancing the hardships to the government and the defendant, must exempt from a post-indictment restraining order whatever funds are needed to defray the defendant's ordinary living expenditures, including reasonable attorneys fees, prior to the conclusion of trial. It necessarily follows that any funds paid, consistently with the restraining or-

defendant's subsistence expenses pending trial, Congress did discuss another form of innocuous diminution in the value of a defendant's forfeitable estate. Noting that "a defendant may succeed in avoiding the forfeiture sanction simply by transferring his assets to another \* \* or taking other actions to render his forfeitable property unavailable at the time of conviction" (S. Rep. 98-225, supra, at 201), Congress in 1984 proposed adding a "substitute assets" provision to the CCE statute. This provision, ultimately enacted in 1986, permits forfeiture of substitute assets if property subject to forfeiture, "as a result of any act or omission of the defendant. \* \* has been substantially diminished in value." 21 U.S.C. (Supp. IV 1986) § 853(p)(4). Congress explained in 1984 that this provision "will be of utility where a defendant substantially depletes a forfeitable asset in anticipation of its being forfeited. It is phrased, however, so that it will not apply where the value of the property has been subject to minimal or ordinary depreciation." S. Rep. 98-225, supra, at 202 n.32 (emphasis added).

der, to third-party providers of goods and services must be immune from forfeiture if the defendant is ultimately convicted. This conclusion is dictated by the statutory language, by basic principles of equity, and by common sense.

1. Section 853(c) of the CCE statute, 21 U.S.C. (Supp. IV 1986) § 853(c), entitled "Third party transfers," provides as follows (emphasis added):

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture.

This "relation-back" provision, like the restraining-order provisions, was designed to ensure that defendants do not evade forfeiture by improperly alienating their assets before trial. Congress's expressed objective in Section 853(c) was to "set[] out clear authority for voiding improper preconviction transfers of assets subject to criminal forfeiture." S. Rep. 98-225, supra, at 197 (emphasis added). As to what constitutes an "improper transfer," the legislative history refers to "transfers that were not 'arm's length'" (id. at 201); "sham or fraudulent transactions" (id. at 209 n.47); and transfers "to third parties acting as nominees of the defendant" (ibid.). On the other hand, Congress stated that "this provision should not operate to the detriment of innocent bona fide purchasers of the defendant's property" (id. at 201).

2. The language and legislative history of Section 853(c) show that it vests the district court with equitable discre-

tion in imposing a forfeiture. Just as Section 853(e)(1) states that the court "may enter a restraining order," so Section 853(c) states that property transferred to third parties "may be the subject of a special verdict of forfeiture." As Judge Winter concluded in *Monsanto*, these two sections must logically "be interpreted in pari materia" (852 F.2d at 1410). In other words, once a court has exercised its discretion to issue a restraining order that permits payment of the defendant's necessary living expenses, the court must similarly exercise its discretion to immunize the payees from forfeiture of the funds that they have in good faith received.<sup>16</sup>

Any other construction of the relation-back provision. as Judge Winter pointed out, "would essentially nullify the district court's equitable authority to permit defendants to make ordinary lawful expenditures under Section 853(e)(1)." Monsanto, 852 F.2d at 1410. If payments made to third parties consistent with the restraining order were subsequently forfeited, it would make a mockery of the court's processes. The court's order would be a nullity unless the doctors, lawyers, and grocers who furnished the defendant's necessities were assured that they could keep the money they were paid. Lacking such assurance, they would refuse to deal with the defendant at all. Thus, if the court's power to authorize payment of necessary living expenses is to have any effect, payments made to thirdparty providers of necessities must be immunized from forfeiture under Section 853(c). Accord, United States v. Monsanto, 852 F.2d at 1418 (Mahoney, J., dissenting); id. at 1419 (Pierce, J., concurring in part and dissenting in part).

This same conclusion is dictated by principles of equity. since a contrary result would punish, not the convicted defendant, but the third-party providers who acted in good faith and in reliance on the district court's authority. A private defense counsel, for example, who continued to represent the defendant based on a post-indictment restraining order allowing fees to be paid from allegedly forfeitable assets, would be irrationally penalized if the government were later permitted to forfeit his fee. It is no answer that the defense attorney, like other third-party transferees, has a right under Section 853(n)(6)(B) to assert an interest in the property at a post-conviction hearing. Although the lawyer would be a bona fide purchaser for value, he could not demonstrate that he was "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). Indeed, "[n]o one is more on notice of likelihood that [illicit] money may come from \* \* \* prohibited activity than the lawyer who is asked to represent the defendant [at] trial." United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

The government has a powerful interest in punishing convicted drug traffickers and stripping them of their economic power. But the government has no legitimate interest in punishing those persons who, in reliance on a district court order, provide goods and services to the defendant for fair value and in good faith. Accordingly, once a court decides under Section 853(e)(1) to permit the defendant to make ordinary and necessary living expenditures under the court's supervision and control, the funds so paid must be exempt from subsequent forfeiture in the hands of the third parties.

3. In the instant case, the district court issued at the government's request an ex parte restraining order covering virtually all Reckmeyer's assets. That order made no exceptions for payment of attorneys fees or for living expenses of any kind. Applying to the instant case the principles just discussed, it is clear that the fees that would have been paid to Caplin & Drysdale but for the overbroad

<sup>16</sup> This construction of Section 853(c) does not circumvent the requirement appearing in the same subsection that property which is the subject of a special verdict of forfeiture "thereafter shall be ordered forfeited to the United States." 21 U.S.C. (Supp. IV) § 853(c). This latter clause simply mandates the forfeiture of assets as to which the court has rendered a special verdict of forfeiture. For the reasons discussed in the text, however, such a special verdict of forfeiture would not include property transferred as payment to third parties pursuant to exceptions in the court's restraining order.

restraining order must be exempted from forfeiture under Section 853(c).

If the district court had exercised its equitable discretion at the ex parte hearing, as required by the statute, it plainly would have made some provision for the payment of Reckmeyer's legitimate attorney's fees and other necessities of life. Indeed, but for the fact that Reckmeyer pled guilty the day before his motion to modify the restraining order was scheduled to be heard, the district court would undoubtedly have granted that motion and permitted the payment of fees. This is evident from the court's subsequent ruling on Caplin & Drysdale's Section 853(n) claim. In granting the firm's request to modify the forfeiture order, the court concluded that "there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorneys' fees" (Pet. App. 89a). The district court also found that, if attorneys fees were not exempted from forfeiture, counsel of choice would withdraw from the case, thus causing substantial harm to the defendant (ibid.).17

Based on the district court's findings concerning hardship and the government's interest in forfeiture, there can be little doubt that the court, had it exercised its equitable discretion from the outset, would have struck the balance in favor of excepting from the restraining order those assets needed by Reckmeyer to pay ordinary lawful expenditures, including Caplin & Drysdale's legal fees. Moreover, if for some reason the district court would not have exempted sufficient assets to pay those fees, it would have erred in failing to do so for the reasons set out in the discussion of Section 853(e)(1)(A) above. In either event, the government cannot now be permitted, in reliance on an overbroad ex parte order, to demand forfeiture of assets that would have been immune from forfeiture if paid to Caplin & Drysdale under an order that was validly entered.

II. IF THE STATUTE IS CONSTRUED SO AS TO PRE-VENT A DEFENDANT FROM PAYING LEGAL FEES AND OTHER NECESSARY LIVING EXPENSES PRIOR TO THE CONCLUSION OF TRIAL, IT IS UNCONSTI-TUTIONAL UNDER THE FIFTH AND SIXTH AMEND-MENTS

This Court has often invoked the principle that, when a statute is fairly susceptible of more than one interpretation, the interpretation most consistent with constitutionality should be adopted. We believe that our construction of the 1984 forfeiture amendments, outlined above, is most consistent with the statutory language, with the legislative history, and with general principles of equity. At the very least, it is a fair and reasonable construction of the statute that should be adopted so as to avoid the serious difficulties that would otherwise arise. Even the Fourth Circuit acknowledged that its holding created "many complex problems concerning access to defense counsel, the attorney-client privilege, and the re-

<sup>&</sup>lt;sup>17</sup> Caplin & Drysdale's willingness to continue its representation of Reckmeyer in this case was based, in large part, on its belief that the statute should not be read to bar payment of fees, or, in the alternative, that the statute was unconstitutional (Pet. App. 76a n.11). If this Court affirms the Fourth Circuit, defense counsel in the future would almost certainly decline such a representation.

<sup>18</sup> See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S.Ct. 1392, 1397 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"); Johnson v. Robison, 415 U.S. 361, 366-367 (1974) ("it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided" (citation omitted)); United States v. Rumely, 345 U.S. 41, 45 (1953) (choice between "fair alternatives" must favor that which avoids serious constitutional questions). Indeed, this Court upon occasion has construed statutes in ways contrary to their most literal reading in order to avoid unjust, oppressive or absurd results. See United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-487 (1868). See also Chatwin v. United States, 326 U.S. 455, 464 (1946); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

source needs of public defenders" (Pet App. 19a.) "[I]f anything remains of the canon that statutes capable of differing interpretations should be construed to avoid constitutional issues," Judge Winter wrote in *Monsanto*, "it surely applies here." 852 F.2d at 1409 (citing *Kent v. Dulles*, 357 U.S. 116 (1958)).

A. The Sixth Amendment Bars The Governmental Use Of Criminal Forfeiture To Deprive A Defendant Of His Ability To Retain Counsel To Defend Against The Charges On Which The Proposed Forfeiture Is Based

An interpretation of the 1984 Act that would empower a district court, upon ex parte application by the government, to restrain all of a defendant's assets would permit the government to render most CCE and RICO defendants unable to retain private counsel to defend themselves. Similarly, the threat of forfeiture of legal fees under Section 853(c), even in the absence of a pre-conviction restraining order, will cause most private counsel to decline to represent a defendant charged with a broad forfeiture count. Because there is no countervailing governmental interest capable of justifying this extreme restriction on a defendant's right to retain counsel of his choice, the 1984 Act as so interpreted would be unconstitutional under the Sixth Amendment.

1. The Fourth Circuit's construction of the statute would make it impossible for a defendant charged with a broad forfeiture count to retain private counsel

The Fourth Circuit en banc recognized only one exception to the government's absolute right to forfeit a convicted defendant's property—the thi.d-party exemptions set forth in Section 853(n). See Pet. App. 22a. Under Section 853(n)(6)(B), however, a third-party transferee cannot defeat the government's claim unless he proves that he was "reasonably without cause to believe that the property was subject to forfeiture." By virtue of the services that an attorney performs and the information to which he necessarily has access, a competent defense lawyer would rarely if ever be able to make such a showing.

The Fourth Circuit's reading of the statute thus gives the government virtually absolute power, in a wide variety of cases, 19 to ensure that no private counsel will take the defendant's case. By securing a broad, ex parte restraining order, the government can prevent the payment of counsel fees outright. And even without a restraining order, the government can put prospective counsel "on notice," through forfeiture counts in the indictment, that legal fees previously or subsequently paid are at risk. Indeed, in most drug and white collar criminal cases, the prosecutor could prevent a defendant from ever retaining private defense counsel, or could bring about the immediate termination of an existing representation, simply by adding a RICO or CCE charge that includes a broad list of assets subject to forfeiture.20

Besides the risk of non-payment, ethical problems caused by the Fourth Circuit's holding will cause competent defense counsel to decline CCE and RICO representations. As construed by the *en banc* court, the CCE statute pro-

<sup>&</sup>lt;sup>19</sup> Although most current criminal forfeiture litigation concerns defendants charged with drug-related crimes under the CCE statute, the principles established in these cases extend through the RICO statute to a variety of white collar criminal prosecutions.

<sup>™</sup> Assets subject to forfeiture under CCE are not limited to the proceeds of drug sales but also include any property used in whole or in part in the commission of drug offenses and any property or rights "affording a source of control over, the continuing criminal enterprise." 21 U.S.C. (Supp. IV 1986) § 853(a). The RICO forfeiture provisions, 18 U.S.C. (Supp. IV 1986) § 1963(a), can produce even more draconian results because they render an entire enterprise subject to forfeiture if the government charges that it was used in a relatively isolated pattern of racketeering activity. For example, in a recent RICO prosecution in the Eastern District of Virginia, defendants convicted of selling \$105 worth of pornographic material in violation of RICO forfeited their entire interest in their legitimate video cassette rental business valued at over \$1 million. United States v. Pryba, No. 87-00208-A (E.D. Va. 1988). Under the Fourth Circuit's reading of the statute, prospective defense counsel would have to be concerned not only with whether assets used to pay his fees are criminally derived, but also with whether otherwise legitimate assets have become tainted by their connection, however remote, to criminal activity.

duces a direct personal conflict between an attorney's interest in his fee and his client's best defense. The lawyer undertaking such a case would have a disincentive to learn facts about his client's conduct that might be relevant to the defense, but that might inhibit him from demonstrating in post-conviction proceedings that he was at the relevant time "reasonably without cause to believe" that the fee was subject to forfeiture. As the district court below explained (Pet. App. 91a-92a), the conflict between a lawyer's desire to retain his fee and his obligation faithfully to represent his client could also result in a reluctance to pursue certain defense strategies, or in recommendations in the plea-bargaining context colored by counsel's judgment of which action is most likely to permit payment of his fee.<sup>21</sup>

The significance of these conflicts of interest is not blunted by the Fourth Circuit's facile assurances (Pet. App. 18a-19a) that defense counsel will invariably rise above them. A lawyer is ethically prohibited from entering into an attorney-client relationship, especially in a criminal case, where he has a personal financial interest that may conflict with the interests of his client; it is irrelevant whether he in fact abuses the conflict. See ABA Model Rules of Professional Conduct ("Model Rules") 1.7(b), 1.8(j); ABA Model Code of Professional Responsibility ("Model Code") DR 5-103(A), 5-105(A).<sup>22</sup> The conflicts created by forfeiture of

attorneys fees closely resemble those created by contingent fees, which are ethically prohibited in criminal cases. Model Rule 1.5(d)(2); Model Code DR 2-106(C). Such conflicts could easily rise to the constitutional level of ineffective assistance of counsel, spawning additional litigation affecting the validity of criminal convictions and pleas.<sup>23</sup>

In sum, the Fourth Circuit's holding would make it virtually impossible, both for financial and ethical reasons, for CCE and RICO defendants to secure private counsel. While the defendant may qualify for appointed counsel under the Criminal Justice Act, such assistance will rarely be the equal of what he would have obtained on his own. Appointed counsel will almost certainly have less experience in complex CCE and RICO cases, as well as fewer resources with which to investigate and defend the offenses charged. And private attorneys who have handled the case prior to indictment will frequently withdraw, depriving the defendant of their expertise and requiring newly appointed counsel to prepare hurriedly and inadequately for trial.

2. Such an extreme restriction on a defendant's right to counsel of choice, in the absence of any substantial countervailing governmental interest, would violate the Sixth Amendment

a. In Wheat v. United States, 108 S.Ct. 1692, 1697 (1988), this Court squarely held that a defendant has a "Sixth Amendment right to choose [his] own counsel." Accord, e.g., Powell v. Alabama, 287 U.S. 45, 53 (1932). The Court explained in Wheat that this constitutional right is "circumscribed" or "qualified" in various respects (108 S.Ct. at 1697). Some of these qualifications flow from the constraints of the defendant's personal situation, such as

<sup>&</sup>lt;sup>21</sup> For example, an attorney might be motivated to negotiate a plea whereby the defendant would trade gravity of offense or length of sentence for exemption of assets sufficient to pay legal fees. Alternatively, in a close case, the attorney might recommend that the defendant stand trial rather than plead guilty if the government is unwilling to negotiate a plea that would permit fees to be paid. Even at trial, a defendant's interest might best be served by asserting his privilege against self-incrimination, whereas his counsel might be motivated to recommend that he take the stand and explain his financial history in an effort to preserve from forfeiture sufficient assets to pay legal fees.

<sup>&</sup>lt;sup>23</sup> This Court has specifically held that adherence to "ethical standards of the legal profession" is an "independent interest" of the federal

courts because of the "institutional interest in just verdicts." Wheat v. United States, 108 S.Ct. 1692, 1697-1698 (1988).

<sup>&</sup>lt;sup>23</sup> This Court has held that actual conflicts of interest violate the Sixth Amendment guarantee of effective asistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 349 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60, 76 (1942).

his ability or inability to afford a particular lawyer. Other qualifications are sought to be imposed by the government.

Up to now, this Court has considered a variety of governmentally-imposed qualifications on the right to counsel of choice. Most of these have reflected administration-of-justice concerns, such as a prosecutor's desire to disqualify defense counsel for conflicts of interest (e.g., Wheat v. United States, supra) or a court's denial of a continuance to an allegedly unprepared defense lawyer (e.g., Morris v. Slappy, 461 U.S. 1 (1983); Ungar v. Sarafite, 376 U.S. 575, 588-591 (1964)). The lower courts have addressed restrictions of a similar nature, such as requirements that chosen defense counsel be a lawyer (e.g., United States v. Schmitt, 784 F.2d 880 (8th Cir. 1986)) or a member of the bar of the state in which the court sits (e.g., Bedrosian v. Mintz, 518 F.2d 396 (2d Cir. 1975)).

When this Court has upheld the denial of a defendant's counsel of choice, it has done so by weighing the competing interests and concluding that the judicial system's interest in the fair and efficient administration of justice outweighed the defendant's interest in retaining a particular lawyer. See e.g., Wheat v. United States, supra, 108 S.Ct. at 1698 (reasoning that a conflict of interest on the part of chosen counsel can deprive the defendant of his right to effective assistance and preclude a fair trial). The defendant's interest in each of these cases was quite limited: the desire to hire one particular lawyer from among the universe of available counsel. The Court has not previously considered a situation, such as this one, in which the government seeks to deprive a defendant of the ability to retain private counsel of any kind.

b. In this case, the initial Fourth Circuit panel opinion balanced the competing interests of the government and the defendant and concluded that the CCE forfeiture provisions are unconstitutional to the extent they prevent the payment of legitimate attorneys fees (Pet. App. 70a). The panel reasoned (id. at 60a-63a) that the right to counsel of choice, albeit qualified, is the core of the Sixth Amend-

ment right to counsel, predating the more recently articulated right to appointed counsel (Gideon v. Wainwright, 372 U.S. 335, 344 (1963)) and the right to effective assistance of counsel (McMann v. Richardson, 397 U.S. 759, 771 (1970)). The panel distinguished cases that have permitted the denial of a defendant's request for a particular lawyer, pointing out that the government's interpretation of the forfeiture provisions would deny a defendant the opportunity to hire any counsel at all (Pet. App. 68a-69a).

Balancing the government's asserted interests in forfeiting assets intended or used to pay legal fees against this total denial of a defendant's right to counsel of choice, the panel reasoned that the government's interests are paramount only to the extent they track the specific purpose of the "relation-back" provision—to prevent sham transfers in the guise of attorneys fees (id. at 67a-69a). If a defendant is permitted to pay legitimate attorneys fees, the panel reasoned, the government's interest in depriving a criminal of the economic benefits of his crime upon conviction can be squared with the defendant's right to hire counsel of choice to defend him (id. at 67a). Accord, United States v. Monsanto, 852 F.2d at 1402-1404 (Feinberg, C.J., concurring).

The panel's analysis is plainly correct. As we have already shown (see pages 23-28, supra), the government has no cognizable interest, at least none derived from the 1984 Act, in disabling a defendant from paying bona fide attorneys fees and other necessary living expenses prior to the conclusion of trial. On the other side of the balance, the interference with a defendant's ability to hire counsel of choice is complete—no defendant subject to a forfeiture claim covering all his known assets, such as the claim asserted in the indictment in this case, will be able to pay or assure payment to a lawyer and, consequently, he will be unable to retain any private counsel.<sup>24</sup> This total denial

<sup>&</sup>lt;sup>24</sup> As the panel recognized, the defendant in this case, Christopher Reckmeyer, would not have been represented by retained counsel if the law were not unsettled at the time of his indictment and Caplin

of any opportunity to hire counsel has a direct impact on the reliability of the adversary process because it will frequently eliminate the lawyers who have represented the defendant prior to indictment and who are most familiar with his case.

c. The court of appeals in its en banc opinion failed to balance the government's interests against the defendant's Sixth Amendment rights. Instead, it adopted the erroneous view that a defendant facing forfeiture charges has no assets with which to hire a lawyer, and thus occupies the same position as a pauper who has no alternative to court-appointed counsel (Pet. App. 13a). The majority acknowledged that the statute "can render a defendant unable to secure private counsel through a restraining order or the threat of future forfeiture" (id. at 9a). But relying on the relation-back provision and the fact that "the government contests the legal ownership of the assets," the court asserted that the right to counsel of choice "simply does not apply at all in the fee forfeiture context" (id. at 11a-12a).

By equating the fictive property-law concept of the relation-back provision with such "[p]urely private predicaments" as creditors' liens or lack of wealth (Pet. App. 13a), the en banc majority begged the constitutional question rather than answering it. What the Fourth Circuit majority assiduously ignored is that the forfeiture provisions are explicitly penal in nature and attach only upon the defendant's conviction of the underlying crime. 21 U.S.C. (Supp. IV 1986) § 853(a). Absent conviction, the property sought to be forfeited does not vest in the government, regardless of how illegitimately the defendant may have employed his wealth. Thus, the relation-back provision is properly viewed as a mechanism for prevent-

ing fraudulent conveyances of the defendant's assets, not as a device for determining true title to property.

The Fourth Circuit also completely ignored the government's role in rendering the defendant's assets unavailable to him. The defendant's "private predicament" here does not result from the laws of nature or economics. Rather, the unavailability of his assets comes about solely as a result of a prosecutor's allegation, under a federal penal statute, that the accused has no assets that are not subject to forfeiture, accompanied by the district court's issuance of a broad restraining order on the prosecutor's ex parte request. Indeed, the majority's assertion that "the fact that the government contests the legal ownership of the assets is crucial" (id. at 12a) concedes both the government's responsibility for the defendant's impecuniousness and the fact that the defendant's wrongdoing has yet to be proved. In short, it is only by attempting to cast the government in the role of Pontius Pilate, disclaiming any responsibility for the defendant's forced indigency, that the Fourth Circuit could avoid addressing the balancing of interests called into play by the "Sixth Amendment presumption in favor of counsel of choice". Wheat v. United States, supra, 108 S.Ct. at 1697.

We have previously shown that the sole detriment suffered by the government when allegedly-forfeitable assets are used to pay attorneys fees is a modest sum of moneythe difference between the cost to the Treasury of providing the defendant with a lawyer (i.e., the cost of a public defender or appointed counsel), and the reasonable fees of a private attorney. The Fourth Circuit en banc in effect holds that this marginal increment in the amount of money the government may retain upon conviction is constitutionally superior to a defendant's Sixth Amendment right to counsel of choice. But this Court has never suggested, in this or any other context, that the government's interest in maximizing a monetary penalty has precedence over a defendant's constitutional rights. As the Fourth Circuit panel concluded, and as the four en banc dissenters found, the government's rather modest financial

<sup>&</sup>amp; Drysdale had not agreed to contest the applicability of the CCE statute to attorneys fees (Pet. App. 76a-77a n.11).

<sup>&</sup>lt;sup>28</sup> Assets potentially subject to forfeiture thus differ from the proceeds of a bank robbery, since the bank's claim, unlike the government's, is not based on a penal statute but on its pre-existing property rights. Assets subject to forfeiture under Section 853(a) likewise differ from illegal drugs, since nobody can have legal title to contraband.

interest cannot reasonably be found to outweigh a defendant's right to retain *some* private counsel to defend him against the type of complex, far-ranging criminal charges at issue in CCE and RICO cases such as this.

d. The Fourth Circuit supported its refusal to recognize Reckmeyer's Sixth Amendment rights by positing that "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture" (Pet. App. 21a-22a). Quite the contrary: public confidence in the judicial system is far more likely to be impaired by the spectacle of defendants being purposefully rendered indigent by the government before trial, particularly where the possibility exists that forfeiture claims can be used selectively to remove unusually competent adversaries. As this Court observed in Wheat, a cardinal value of the Sixth Amendment is that "legal proceedings appear fair to all who observe them" (108 S.Ct. at 1697). A system that affords the government the discretion to restrict the resources available to its opponent to contest the very allegations at issue is unlikely to seem fair either to the citizenry or to the bar.26

B. The Fifth Amendment Prohibits Empowering The Government To Destroy The Balance Of Forces Between It And The Accused By Eliminating, At Its Discretion, An Indicted Defendant's Ability To Retain Private Counsel

This Court has recognized that the Due Process Clause of the Fifth Amendment requires a "balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474 (1973). In a somewhat different context, the Court has stated that due process requires criminal procedures that do not offend a "sense of justice." Rochin v. California, 342 U.S. 165, 173 (1952). And this Court has held that a defendant's due process protection includes a "reasonable opportunity to employ and consult with counsel." Chandler v. Fretag, 348 U.S. 3, 10 (1954).

The district court in this case correctly concluded that "forfeiture of attorney's fees would undermine the adversary system \* \* \* by producing an imbalance of powers that would violate the due process clause" (Pet. App. 91a). As the district court explained (id. at 90a-91a):

[S]ubjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is "on notice." Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable.

The district court in *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985), properly reached the same conclusion, noting that forfeiture of attorneys fees would give the government "the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an in-

<sup>28</sup> This Court's reasons for upholding the denial of a defendant's counsel of choice in Wheat-the elimination of serious potential conflicts of interest on the part of defense counsel with their attendant deleterious effects on the fair administration of justice-cut exactly the opposite way in the instant case. As we have explained above (at pages 35-37), any attorney willing to represent a defendant faced with broad forfeiture counts will confront a "serious potential for conflict" (108 S.Ct. at 1700) between his obligation faithfully to represent his client and his desire to retain his fee. An ethical lawyer who has represented his client throughout the grand jury proceedings may be forced to resign (or be disqualified on the government's motion because of a potential conflict under Wheat), thereby substantially impairing the quality of the client's defense and "the institutional interest in the rendition of just verdicts in criminal cases" (108 S.Ct. at 1698). And whereas the counsel-of-choice issue in Wheat was limited to whether a particular lawyer could represent the defendant, the impact of fee forfeiture will be to eliminate, at the discretion of the prosecutor, the entire universe of ethical retained counsel. As the panel in this case noted (Pet. App. 63a), the effect of the government's including a broad forfeiture count in a CCE or RICO indictment is the same as if Congress had passed

a law dictating which lawyers a defendant might retain, or placing a cap on the fee that his chosen lawyer might be paid.

dictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries."

The Fourth Circuit, while acknowledging the possibility of prosecutorial abuse, held that any such misconduct must be determined on a case-by-case basis by evaluating the "specific facts" relating to a forfeiture allegation (Pet. App. 19a). The problem with that approach, as with any challenge to the exercise of prosecutorial discretion, is that it is virtually impossible for a court (at least one lacking clairvoyance) to ascertain what a prosecutor's purpose was in deciding whether, and to what extent, to include forfeiture allegations in an indictment. Furthermore, unlike the normal exercise of prosecutorial discretion involved in determining whether to charge a defendant with one or more crimes, the prosecutorial decision concerning forfeiture will, in many instances, allow the government to increase substantially the likelihood of obtaining a conviction by eliminating the experience, talent and investigative resources of private counsel.

In the court of appeals, the government denied any attempt to arrogate to itself the power to determine its adversaries in criminal proceedings (C.A. Br. 34-35). Instead, the government argued that a defendant rendered indigent by the prosecutor's unproven accusations has only himself to blame, since he voluntarily engaged in conduct that the government intends to prove wrongful (*ibid.*). But this argument erroneously assumes the defendant's guilt. Equally improperly, it ignores the dangers posed to our adversary system when the likelihood that retained counsel can undertake or continue a representation is increasingly diminished, the more serious and complicated the government's charges become.

The impact of a decision upholding the government's position in this case would be widespread, extending from drug cases like this one to a variety of white collar RICO prosecutions. The effect of the Fourth Circuit's decision would expand even further as Congress adds to the list

of forfeitable offenses. A bill now pending in Congress, for example, would make simple mail and wire fraud forfeitable offenses, and other legislative initiatives would make the proceeds of tax crimes forfeitable under the money-laundering statutes.<sup>27</sup> The Fourth Circuit's decision, unless reversed, will thus cause many of the most complex white collar criminal prosecutions to devolve upon already overburdened and underfunded court-appointed attorneys and public defenders, since private counsel will refuse to take the risk that their legitimately earned fees either will be unpaid or will be subsequently forfeited to the government.

The Fourth Circuit's decision would also work a fundamental change in the historic relationship between a defendant, his counsel, and the prosecutor. For almost 200 years prior to the 1984 forfeiture amendments, a defense lawyer could play his role in the adversary system without fear that he would himself be the target of government action except for conduct manifestly illegal, such as witness tampering, jury tampering, subornation of perjury, or the like. Now, the mere receipt of payment for services rendered in good faith may be prevented or attacked by the government. The prosecutor's considerable discretion in determining the scope of the indictment and the property subject to forfeiture in effect places the defendant and his counsel at the mercy of his adversary. One does not have to posit malicious abuses of government power to recognize the significant shift in the balance of forces between prosecution and defense wrought by the Fourth Circuit's decision. The creation of such an imbalance of powers undermines the adversary system and is in itself a violation of the Due Process Clause.

### CONCLUSION

The decision of the Fourth Circuit en banc should be reversed, and the case should be remanded with instruc-

Fr See H.R. 2898, 100th Cong., 1st Sess. (1987); Draft Bill, Minor and Technical Criminal Law Amendments Act of 1988, § 149, Senate Committee on the Judiciary, 100th Cong., 2d Sess. (1988).

tions to reinstate the judgment of the district court in favor of petitioner.

# Respectfully submitted,

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January 5, 1989

FEB 27 1989

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

ν.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

#### **BRIEF FOR THE UNITED STATES**

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### QUESTIONS PRESENTED

- 1. Whether assets that are otherwise subject to criminal forfeiture under the drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), are exempt from forfeiture if the defendant wishes to use them to pay counsel to represent him in the criminal prosecution.
- 2. Whether, if the statute does not exempt such assets from forfeiture, the district court may nevertheless exclude them from an order of forfeiture as a matter of equitable discretion.
- 3. Whether, if the statute does not exempt such assets from forfeiture and the district court may not exclude them as a matter of equitable discretion, the statute is unconstitutional under the Fifth or Sixth Amendment where it has the effect of rendering the defendant financially unable to pay the fee charged by the attorney he wants to represent him in the criminal case.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1729

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

W.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

### BRIEF FOR THE UNITED STATES

### **OPINIONS BELOW**

The opinion of the court of appeals en banc (Pet. App. 1a-29a) is reported at 837 F.2d 637, and the opinion of the panel of the court of appeals (Pet. App. 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (Pet. App. 81a-92a) is reported at 631 F. Supp. 1191.

### JURISDICTION

The judgment of the en banc court of appeals was entered on January 11, 1988 (J.A. 9). On February 26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 7, 1988 (J.A. 99). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments of the United States Constitution and 21 U.S.C. (Supp. IV) 853 are reproduced at App., infra, 1a-10a.

### STATEMENT

1. The federal drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), created a broad forfeiture remedy against narcotics traffickers. Section 853(a) provides that a person who is convicted of engaging in a continuing criminal enterprise shall forfeit to the United States any property derived from his narcotics activities and any property affording him a source of control over the enterprise. Section 853(c) provides that the forfeiture becomes effective at the time of "the commission of the act giving rise to forfeiture." Under that subsection, even if the defendant subsequently transfers the property to a third party, the property may still be the subject of a special verdict of forfeiture and, if such a verdict is returned, "shall be ordered forfeited to the United States." 21 U.S.C. 853(c) (Supp. IV 1986). Section 853(e)(1) authorizes the court to issue a pretrial restraining order to prevent the defendant from transferring property that would in the event of conviction be subject to forfeiture under Section 853(a).

If the defendant is convicted and the district court enters an order of forfeiture, a third party may then petition the court to amend the order of forfeiture to exclude particular property if he establishes either (A) that he had an interest in the property that was superior to the interest of the defendant at the time the defendant committed the act giving rise to forfeiture, or (B) that he was a bona fide purchaser of the property for value and was reasonably without cause to believe that it was subject to forfeiture.

21 U.S.C. 853(n)(6) (Supp. IV 1986).

2. On January 15, 1985, Christopher F. Reckmeyer, II, was charged in an indictment filed in the United States District Court for the Eastern District of Virginia. The indictment alleged that Reckmeyer was the head of a massive drug operation. J.A. 28-40. Count 2 of the indictment charged Reckmeyer and two others with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (J.A. 32-33). Count 2 also sought forfeiture under Section 853 of any profits the three defendants obtained as a result of their participation in the continuing criminal enterprise and any interests in property that afforded them a source of influence over the enterprise (J.A. 33). Specific assets subject to forfeiture were then listed in 41 succeeding paragraphs of the indictment (J.A. 33-40). See Pet. App. 4a, 31a.

The day before the indictment was returned, the district court entered an ex parte order pursuant to 21 U.S.C. 853(e)(1)(A) (Supp. IV 1986) restraining the transfer of assets by Reckmeyer (J.A. 11-27). Two months later, Reckmeyer moved to modify the restraining order to exclude assets that he wished to use to pay petitioner, the law firm of Caplin & Drysdale, and Stanley J. Reed, a member of another firm who had been retained to assist petitioner in representing Reckmeyer in the criminal case (J.A. 43-48). In particular, the motion requested the court to set up a procedure under which counsel "will be paid for ongoing services rendered and costs incurred in Reckmeyer's defense out of Reckmeyer's funds presently in the possession of the government or in the possession of third parties but frozen pursuant to the Court's restraining order of January 14, 1985" (J.A. 48).1

<sup>&</sup>lt;sup>1</sup> On the day before the indictment was returned, Reckmeyer had given petitioner two checks in the amount of \$5000 each in partial payment for services rendered prior to that date. After the checks were

On March 14, 1985, before a hearing was held on Reckmeyer's motion to modify the retraining order, Reckmeyer pleaded guilty to the CCE count and two tax evasion counts (Pet. App. 82a). The government's factual statement accompanying the agreement stated that Reckmeyer's organization was responsible for the distribution of more than 169 tons of marijuana and 10 tons of hashish over the course of 50 ventures. Although Reckmeyer disputed some of the facts in the government's statement, he admitted that he had realized millions of dollars from drug transactions, which were his only significant source of income. Id. at 4a; see United States v. Reckmeyer, 786 F.2d 1216, 1219-1222 (4th Cir.), cert. denied, 479 U.S. 850 (1986). As part of the plea arrangement, Reckmeyer agreed to the forfeiture of the assets specifically listed in the indictment, as well as any proceeds from those assets and all other assets that were the proceeds of his drug activities or were directly or indirectly related to those activities (id. at 1217). His guilty plea and agreement to forfeit the listed property were "unconditional," and did not reserve any of the covered assets from forfeiture (J.A. 51).

The next day, the district court denied the pending motion to modify the restraining order (J.A. 49-56). The court concluded that Reckmeyer's guilty plea, including

deposited, however, they were returned unpaid because the restraining order had frozen the funds in the account on which they were drawn (J.A. 52-53, 67-68; Pet. App. 39a, 82a). In addition, after Reckmeyer's surrender, petitioner notified the court on January 25, 1985, that it had received approximately \$25,000 from Reckmeyer toward the payment of fees owing for prior services (most of which apparently were performed before the indictment was returned) and had deposited those funds in an escrow account (J.A. 41-42). Reckmeyer's motion to modify the restraining order sought permission to receive the funds placed in escrow and to redeposit the two \$5000 checks (J.A. 47-48), in addition to seeking payment from other assets.

the provision for forfeiture of the listed assets, removed any basis for the court to modify the restraining order to release funds to Reckmeyer so that he in turn could transfer them to petitioner in payment of attorneys' fees. In the court's view, petitioner instead should seek relief in its own right by filing a post-conviction petition under subsection (n) of Section 853 requesting to be paid its fees out of the property that was forfeited to the United States (J.A. 51, 52-53). The court explained (J.A. 54-55):

The temporary restraining order was a pendente lite type of relief to freeze things until there could be some adjudication under Count 2. There has now been that adjudication. I don't think modification of the temporary restraining order, assuming it is still extant, affects whether those sums are forfeitable of not. \* \* \* I think there is a statutory remedy for a third-party claim against what the Government undertakes to forfeit or forfeits; and I think that's the remedy you will have to pursue.

On May 17, 1985, the court sentenced Reckmeyer to a term of 17 years' imprisonment and entered a Consent Decree for Forfeiture that included virtually all assets possessed by Reckmeyer, including real estate, gems, and \$200,000 in currency (J.A. 57-65). See Pet. App. 39a, 82a-83a; United States v. Reckmeyer, 786 F.2d at 1217 n.1.

3. After the district court sentenced Reckmeyer and entered the consent order of forfeiture, petitioner filed a third-party petition under Section 853(n), requesting the court to amend the order of forfeiture to exclude sufficient property to pay \$170,512.99 in fees and expenses attributable to its representation of Reckmeyer (J.A. 66-69;

see Pet. App. 39a, 82a-83a). The government opposed

petitioner's request (J.A. 70-89).

At a hearing on the motion in early November 1986 (J.A. 90-97), petitioner conceded that it was not entitled to relief under subsection (n)(6)(B). That was so, petitioner stated, because although the firm would qualify as a bona fide purchaser, it could not satisfy the burden of showing that it was without reasonable cause to believe that the proceeds were subject to forfeiture (J.A. 93). Because the statutory basis for relief under subsection (n)(6)(B) was unavailable, petitioner acknowledged that it had the "heavy burden" of convincing the court that the forfeiture statute was not intended to apply at all in the situation where a law firm seeks payment of its fees out of property that has been declared forfeited to the United States (J.A. 93).

In an order dated March 27, 1986, the district court granted petitioner's motion and amended the order of forfeiture "to reflect that the firm of Caplin & Drysdale has legal right, title, and interest in the sum of \$170,512.99 out of the forfeited assets of Christopher Reckmeyer" (J.A. 98). In its accompanying opinion, the court held, as a matter of statutory construction, that assets used to pay attorneys' fees are exempt from forfeiture under Section 853 (Pet. App. 81a-92a). The court acknowledged that a literal reading of the statute encompasses assets that might be used to pay legal fees, because it provides for the defendant to forfeit "any property" that constitutes the proceeds of or was used to facilitate the criminal activity

and "any of his interest in" the CCE enterprise (Pet. App. 87a, quoting 21 U.S.C. 853(a) (Supp. IV 1986)). But the court concluded that such a construction would violate a defendant's Sixth Amendment right to obtain counsel of his choice and would deprive the defendant of the effective assistance of counsel by giving rise to a conflict of interest as a result of the attorney's pecuniary interest in the outcome of the case (Pet. App. 88a-92a).

4. On the government's appeal, a panel of the court of appeals affirmed the district court's order excluding the \$170,512.99 from forfeiture (Pet. App. 30a-80a). The panel first held, contrary to the district court's view, that Section 853 does apply to assets that a defendant intends to use to pay his attorney (id. at 41a-52a). In the panel's view, the language of the relevant forfeiture provisions "is so clear and so plainly reaches property legitimately contracted to be paid or paid as attorneys fees as not to permit judicial resort to legislative history" (id. at 42a; see id. at 32a-36a). The panel further concluded that "even if resort to legislative history were made, examination of that history would reveal no such clear intent to exclude property marked for or paid as attorney fees as would be required to compel such an interpretation, and indeed would tend rather to confirm the contrary intention reflected in the plain statutory language" (id. at 42a; see id. at 45a-52a). In particular, the panel held that passing references in the legislative history to Congress's insistence that defendants not avoid forfeiture by entering into "'sham'" or "'fraudulent'" transactions did not confine the broad language of the statute to those particular situations (id. at 46a-47a, quoting S. Rep. No. 225, 98th Cong., 1st Sess. 200-201, 209 n.47 (1983)). In the panel's view, that interpretation would ignore the carefully drawn exceptions to forfeiture under Section 853(n), which are

<sup>&</sup>lt;sup>2</sup> The district court characterized petitioner as "a good faith provider of services for value" and observed that petitioner "ha[d] not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets" (Pet. App. 83a).

limited to claims by third parties who had an interest in specific property that was superior to that of the defendant at the time he committed the act giving rise to forfeiture and claims by third parties who were bona fide purchasers of the property without reasonable cause to believe that the property was subject to forfeiture (Pet. App. 46a-50a).

The panel next rejected the contention that the forfeiture provisions should be held unconstitutional because of the possibility that in some circumstances the potential for forfeiture of assets might give rise to a conflict of interest on the part of the attorney or otherwise affect his relationship with the defendant. The panel reasoned that such claims of ineffective assistance of counsel should be decided on the basis of the facts in an individual case, if the defendant was convicted. Pet. App. 59a-61a.

The panel held, however, that the statutory forfeiture provisions are unconstitutional to the extent that they apply to assets that the defendant uses or proposes to use to pay what the panel termed "legitimate" attorneys' fees. In the panel's view, the prospect that assets might be subject to a restraining order prior to trial, and to an order of forfeiture after conviction, would deter an attorney from accepting the case and would thereby impermissibly interfere with the defendant's Sixth Amendment right to retain counsel of his choice. Pet. App. 61a-73a.

5. The full court of appeals granted the government's petition for rehearing en banc and reversed the district court's order excluding from forfeiture the \$170,512.99 that petitioner sought to recover for its representation of Reckmeyer (Pet. App. 1a-29a). As a threshold matter, the en banc court unanimously agreed with the panel that Section 853 does not exempt from forfeiture those assets that the defendant would like to use to pay attorneys' fees (Pet.

App. 5a-7a; id. at 26a (Phillips, J., dissenting)). In the en banc court's view, the statutory language is "unmistakably clear" and "plainly reaches property used or intended to be used for attorneys' fees" (id. at 5a). The court noted that the statutue makes no mention of attorneys' fees in the definition of property that is subject to forfeiture, 21 U.S.C 853(a) and (b) (Sup. IV 1986), or in the exceptions for certain third-party claims, 21 U.S.C. 853(n) (Supp. IV. 1986), but rather "exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys" (Pet. App. 6a). The en banc court also agreed with the panel that "the legislative history provides no basis for concluding that attorneys' fees are not subject to forfeiture" (id. at 5a), because the disapproval of "sham" transactions in the legislative history "cannot \* \* \* legitimately be used to restrict statutory language that is unambiguously more broad" and because "limiting forfeiture to assets transferred in sham transactions would read the bona fide purchaser requirement right out of the statute" (id. at 6a).

In contrast to the panel, however, the en banc court held that applying the forfeiture provisions to assets the defendant wishes to transfer to his attorney does not violate the defendant's Sixth Amendment right to counsel (Pet. App. 8a-22a). The court first stressed that the forfeiture statute "poses no threat whatsoever to the absolute right to be represented by counsel" (id. at 8a), because, if necessary, "the defendant's right to representation will be protected by the appointment of counsel" (id. at 9a; see id. at 8a-10a).

The court also concluded that the forfeiture provisions do not impermissibly interfere with a defendant's qualified right to counsel of his choice (Pet. App. 11a-16a), which is necessarily "limited by the government's interest in the

orderly administration of justice" (id. at 11a). The court observed that prior decisions concerning the right to counsel of choice had involved situations in which the defendant sought to retain counsel by spending his own assets; under the drug forfeiture provisions, by contrast, the assets are "an integral part of the very crime with which the defendant is charged" and therefore constitute property "in which the law recognizes no ownership rights of the defendant" (id. at 12a). The court also pointed out that there are "multitudinous circumstances" that might leave a defendant without the attorney he would most prefer: the attorney might not want to represent the defendant or might be concerned that the defendant will not be able to pay his fee, perhaps because a creditor had obtained liens against his property; or the court's schedule or rules requiring the hiring of local counsel might not allow for representation by a particular lawyer (id. at 13a). In the court's view, the effect of the forfeiture provisions in divesting a participant in a continuing criminal enterprise of any interest he might have in property associated with the enterprise is simply another event that may have the effect of preventing a defendant from choosing a particular lawyer, without constituting a deprivation of the qualified right to counsel of choice that is protected by the Sixth Amendment. The court thus "decline[d] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (id. at 15a).3 ·

### SUMMARY OF ARGUMENT

I. The federal drug forfeiture statute, 21 U.S.C. 853, (Supp. IV 1986), does not permit petitioner, a law firm, to recover a debt owed to it by a criminal defendant from assets that have been forfeited to the United States. Under the statute, a third party holding property that is subject to an order of forfeiture entered in a criminal case can obtain relief from the forfeiture only if the third party had a superior ownership interest in the property at the time the defendant committed the criminal act that gave rise to the forfeiture, or if the third party was a bona fide purchaser for value who was reasonably without cause to believe that the transferred assets were subject to forfeiture.

Petitioner concedes that it can meet neither test. It argues, however, that it should be entitled to recover the funds that the defendant owes it, because those funds should never have been made the subject of a restraining order and should never have been incorporated in the final judgment or forfeiture in this case.

A. As an initial matter, the argument petitioner is making is open, if at all, only to the defendant in the criminal case; any error in the final judgment of forfeiture can be corrected only at the behest of the defendant. A third party such as petitioner is relegated under the forfeiture statute to seeking to establish in proceedings brought under 21 U.S.C. 853(n)(6) (Supp IV 1986) that it is a bona fide purchaser for value without notice of the forfeitability of the funds. Petitioner may not raise the rights of the defendant under other provisions of the statute, particularly when the defendant has specifically waived any objection to the order of forfeiture.

Judge Phillips, joined by Chief Judge Winter and Judges Sprouse and Ervin, dissented (Pet. App. 26a-29a). They concluded that although Section 853 applies to assets that the defendant wants to use to pay an attorney (Pet. App. 26a), the statute is unconstitutional to that extent because the Sixth Amendment prohibits a court from issuing a restraining order or an order of forfeiture that has the effect of

preventing the defendant from using covered assets to retain-counsel of his choice (Pet. App. 26a-29a).

B. In any event, the portions of the statute on which petitioner relies do not establish a basis for recovering the fees the defendant owes to petitioner. Contrary to petitioner's contention, Section 853(c), which governs the forfeitability of property in the hands of third parties, does not give the district court a general dispensing power to order attorneys' fees or other expenses to be paid to third parties out of the forfeited assets. Section 853(c), like Section 853(a), provides that forfeiture is mandatory. Under Section 853(c), if the defendant is convicted and the jury returns a special verdict of forfeiture with respect to particular property, a third party can establish rights to that property only in the two narrow circumstances specified in Section 853(n)(6), neither of which benefits petitioner.

There is no merit to petitioner's contention that the provision of the forfeiture statute governing restraining orders, 21 U.S.C. 853(e)(1) (Supp. IV 1986), imposes a duty on district courts to exclude amounts necessary to pay "ordinary living expenses," including attorneys' fees, from the restraining order and ultimately from the final order of forfeiture. Section 853(e)(1) serves a very limited purpose: to preserve forfeited assets from dissipation during the pendency of the criminal proceeding. It does not provide a means of diverting forfeited assets to defendants or third parties for particular purposes. While Section 853(e)(1) provides district courts with discretion to enter, deny, or limit restraining orders as the need indicates, the hardship of a particular forfeiture to a defendant is not a consideration that bears on the propriety of a restraining order after the indictment is returned, and nothing in Section 853(e)(1) requires the court to exempt from the final order of forfeiture any assets that were not included within the reach of the restraining order, as petitioner contends.

II.A. There is no constitutional bar to the forfeiture in this case. The Sixth Amendment guarantees a defendant the right to the assistance of counsel. Thus, as long as the defendant is provided with representation by a competent attorney, there is nothing in the Sixth Amendment that requires that the defendant be permitted to use funds that are subject to forfeiture to hire the attorney of his choice. Petitioner argues that if the forfeiture in this case is upheld, attorneys will not agree to represent defendants in cases in which forfeitures are sought, because of the risk that all of the defendant's assets will be forfeited and the defendant will not be able to pay his fee. That will occur. if at all, only in cases in which the defendant has no legitimate assets with which to pay his attorneys, since it is only tainted assets that are subject to forfeiture. And the Sixth Amendment does not grant a criminal defendant the right to retain counsel with assets in which the defendant has no legitimate property interest. The policy of preventing narcotics traffickers from taking advantage of the economic power that their criminal conduct grants them overcomes any indirect interference that the forfeiture statutes may effect in the defendant's effort to obtain counsel of his choice.

B. Nor does the drug forfeiture statute violate due process. If there are instances in which prosecutors abuse the forfeiture statute in an effort to deprive defendants of their chosen counsel or otherwise deny them a fair trial, those cases can be addressed as they arise. For the same reasons that the forfeiture statutes do not deprive defendants of their constitutional right to the assistance of counsel, the statutes do not deprive defendants of their right to fair criminal proceedings in general.

### ARGUMENT

# I. THE FEDERAL DRUG FORFEITURE STATUTE DOES NOT AUTHORIZE PETITIONER TO RECOVER ATTORNEYS' FEES FROM FORFEITED ASSETS

In contending that the forfeiture statute furnishes it with a basis for recovering \$170,513 from the property Christopher Reckmeyer forfeited to the United States, petitioner has all but abandoned the principal statutory argument it advanced in the courts below and in the certiorari petition (see Pet. i, 9 n.5, 20-22)—namely, that the forfeiture sanction in Section 853 does not apply to those tainted assets that the defendant uses or wants to use to pay the fee of the attorney who represents him in the criminal prosecution. See Br. 27 n.14.

The argument that Section 853 excludes assets used to pay attorneys' fees from the "property" that is subject to forfeiture under Section 853 was unanimously rejected by the en banc Fourth Circuit in this case; it was unanimously rejected by panels of the Seventh and Tenth Circuits; it was unanimously rejected by the Second Circuit panel in Monsanto; and it was not endorsed by any member of that court on rehearing en banc. In view of that array of authority, it is not surprising that petitioner has chosen

not to rest its case on that theory here. The respondent in *Monsanto*, however, continues to press that argument (see 88-454 Resp. Br. 12-30), and we have therefore addressed it in our brief in that case (at 16-36).

Petitioner instead seizes on the novel argument advanced by three concurring judges on rehearing en banc in the Monsanto case. See 852 F.2d 1400, 1405-1411 (2d Cir. 1988); 88-454 Pet. App. 10a-23a. That argument requires petitioner to look behind the final judgment of forfeiture and to challenge the restraining order that the district court had previously entered in the case. Petitioner's new argument proceeds as follows: First, he argues (Br. 12-28) that the language in Section 853(e)(1)(A) stating that a court "may" issue a postindictment restraining order or take other appropriate action to preserve the availability of assets for forfeiture upon conviction vests the court with equitable discretion. Petitioner then converts the "may" into a "must" by arguing that the court must exercise that discretion in a manner that exempts from pretrial restraint any property the defendant wants to use to pay "ordinary" living expenses, including attorneys' fees. Second, petitioner points to language in Section 853(c) stating that tainted property that was transferred by the defendant to a third party nevertheless "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States." That language, he

<sup>4</sup> Pet. App. 5a-7a; id. at 26a (Phillips, J., dissenting); id. at 41a-53a (panel opinion).

<sup>5</sup> United States v. Moya-Gomez, 860 F.2d 706, 722-723 (7th Cir. 1988); United States v. Nichols, 841 F.2d 1485, 1491-1496 (10th Cir. 1988); id. at 1509 (Logan, J., dissenting).

b United States v. Monsanto, 836 F.2d 74, 78-80 (1987) (88-454 Pet. App. 55a-60a), on rehearing en banc, 852 F.2d 1400, 1402 (1988) (Feinberg, C.J., concurring); id. at 1405 (Winter, J., concurring); id. at 1411 (Miner, J., concurring and dissenting); id. at 1412-1413 (Mahoney, J., dissenting); id. at 1420 (Pratt, J., concurring and dissenting) (88-454 Pet. App. 4a, 11a, 24a, 28a, 44a).

<sup>&</sup>lt;sup>7</sup> As we point out in our brief in *Monsanto* (at 17 n.9), the Fifth Circuit held (albeit somewhat tentatively) in *United States* v. *Thier*, 801 F.2d 1463, 1474 (1986), as modified, 809 F.2d 249 (1987), that an attorney's awareness of the charges against his client would not necessarily disqualify him from relief under the "bona fide purchaser" exception in Section 853(n)(6)(B). The Fifth Circuit has recently granted the government's petition for rehearing en banc in another case, *United States* v. *Jones*, 837 F.2d 1332, 1335 (5th Cir. 1988), which raises the "bona fide purchaser" issue that was addressed in *Thier*. See 844 F.2d 215 (1988).

argues (Br. 29-30), vests the court with equitable discretion to refuse to include such property in the final order of forfeiture. That is so, petitioner insists, even if the government proves all the elements necessary under Section 853(a) and (c) to require the entry of an order of forfeiture, and even if the third-party transferee is unable to qualify for relief under the bona fide purchaser exception in Section 853(n)(6)(B). Again, petitioner converts the "may" to a "must" by arguing that the court must exercise this supposed discretion so as to exclude from forfeiture any property that the court, when considering the restraining order, had allowed the defendant to transfer to third parties in payment of "ordinary" living expenses.

We discuss in Part B why we believe that petitioner's interpretation of the statutory scheme is incorrect. As a preliminary matter, however, we explain in Part A that petitioner is in any event foreclosed from making its new

argument in this case.

## A. Petitioner Is Improperly Attempting To Assert Interests Of The Defendant That The Defendant Has Abandoned

Petitioner's theory of this case turns on the question whether the district court was obligated to modify the restraining order and the final order of forfeiture to authorize Reckmeyer to pay his legal expenses out of the forfeited assets. Reckmeyer, however, did not pursue that claim on his own behalf, but instead pleaded guilty and as part of the plea agreement consented to the forfeiture of all the property identified in the indictment.

The judgment of conviction and the order of forfeiture are now final insofar as Reckmeyer is concerned. His consent to the forfeiture waived the claim in his earlier motion that the court should modify the restraining order to permit him to use some of the frozen assets to pay his at-

torneys. United States v. Fischer, 833 F.2d 647 (7th Cir. 1987); United States v. Pemberton, 852 F.2d 1241 (9th Cir. 1988). As in Pemberton, which involved a similar pretrial motion for release of funds to pay attorneys' fees, when Reckmeyer subsequently "agreed to forfeiture, he relinquished his claim for a release of assets to pay [his attorney's] fees" (id. at 1243); see also United States v. Fischer, 833 F.2d at 648 (the defendant "relinquished her claim by agreeing to forfeiture").8

Principles of finality would now bar Reckmeyer from challenging the judgment of forfeiture and the antecedent restraining order by claiming that the district court erroneously failed to exempt certain assets so that he could use them to discharge his debts to unsecured creditors, such as his attorneys. A fortiori, petitioner cannot seek that relief on Reckmeyer's behalf, in the face of Reckmeyer's agreement to forfeit to the United States the very assets that petitioner seeks to reach. Cf. Ex parte Dorr, 44 U.S. (3 How.) 103, 105-106 (1845).

Petitioner must seek payment of the \$170,513 from the United States in its own right, not by attempting to assert rights of Reckmeyer's, which even Reckmeyer could not now revive. Subsection (k) of Section 853 makes it clear that petitioner may seek that relief only under the standards and procedures established by subsection (n), the provision that sets out the rights of third parties in possession of forfeited assets. Petitioner has conceded both in

See also United States v. Alexander, No. 88-1324 (Feb. 21, 1989), slip op. 12-13 (contemplating that the defendant and the government could enter into an agreement for the surrender of property that did not provide for payment of attorneys' fees out of the defendant's assets).

<sup>9</sup> Subsection (k) provides that, "[e]xcept as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under [Section 853] may \* \* \* intervene in a trial or appeal

the district court (J.A. 93) and in this Court (Br. 31) that it did not qualify for relief under subsection (n) because, in light of the indictment and restraining order, petitioner could not show that it was reasonably without cause to believe that the property out of which it sought the payment of its attorneys' fees was subject to forfeiture.<sup>10</sup>

of a criminal case involving the forfeiture of such property \* \* \* or commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture." 21 U.S.C. 853(k) (Supp. IV 1986).

The legislative history indicates that subsection (k) "is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order." S. Rep. No. 225, 98th Cong., 1st Sess. 206 n.42 (1983). But that does not mean that a defendant's creditors have the same rights and remedies as the defendant; indeed, subsection (k) makes it clear that they do not, and that third parties asserting their own rights are relegated to the protections of subsection (n).

10 There would be another obstacle to relief under subsection (n)(6)(B). Petitioner does not contend that Reckmeyer ever purported to transfer any specific items of property in the forfeited estate to it in payment of the \$170,513 in attorney's fees at issue here. Petitioner therefore is merely a general creditor seeking to recover on a debt owed by Reckmeyer out of a pool of assets that was forfeited to and vested in the United States long before Reckmeyer incurred any obligation to pay petitioner the \$170,513. Subsection (n)(6)(B) was not intended to afford a mechanism, in the nature of a bankruptcy procedure, by which unsecured creditors would be guaranteed a right to recover out of tainted assets that the defendant had forfeited to the United States. See United States v. Campos, 859 F.2d 1233, 1235-1238 (6th Cir. 1988); but see United States v. Reckmeyer, 836 F.2d 200, 206-208 (4th Cir. 1987); United States v. Mageean, 649 F. Supp. 820 (D. Nev. 1986), aff'd, 822 F.2d 62 (9th Cir. 1987). Insofar as the forfeited assets are concerned, the claims of third parties such as petitioner have at all times been subordinate to the paramount title of the United States since the time Reckmeyer committed the acts giving rise to forfeiture. Cf. Dames & Moore v. Regan, 453 U.S. 654, 672-674 &

Instead, petitioner relies on language in subsections (c) and (e), both of which address the competing rights of the defendant and the government and do not create enforceable rights in third parties. Because any rights conferred by those provisions belonged to Reckmeyer and not petitioner, and because Reckmeyer has long since abandoned any interest he may have had in enforcing those rights, petitioner is not entitled to prevail on the argument it is making in this Court, even assuming that argument would have been valid if Reckmeyer had made and pursued it.

## B. A District Court Does Not Have Equitable Discretion Under Section 853 To Grant An Exemption From Forfeiture For Assets Transferred To A Third Party

Even if petitioner is in a position to invoke the theory proposed by the concurring judges in *Monsanto*, that theory should be rejected on the merits, because it rests on an erroneous reading of the drug forfeiture statute.

1. The text of Section 853 makes clear in a number of ways that forfeiture is mandatory, and not discretionary with the court. Subsection (a) of Section 853 provides that "[a]ny person" convicted of a violation of specified provisions of the federal drug laws "shall forfeit to the United States \* \* \* (1) any property" constituting or derived from the proceeds of the offense and "(2) any of the person's property" used in the commission of the offense (emphasis added). Paragraph (3) of subsection (a) further provides that any person (such as Reckmeyer) who is convicted of engaging in a continuing criminal enterprise "shall forfeit, in addition to any property described in paragraph (1) or

nn. 5, 6 (1981). The judgment of forfeiture in the prosecution of Reckmeyer was required only to perfect the government's title to the forfeited property. *United States* v. *Stowell*, 133 U.S. 1, 19 (1890).

(2), any of his interest in, claims against and property or contractual rights affording a source of control over, the continuing criminal enterprise" (emphasis added). This language is comprehensive and mandatory. Any notion that the court might nevertheless have discretion to decline to order the forfeiture of certain property included in this description is conclusively refuted by the very next sentence in subsection (a), which provides that "[t]he court, in imposing sentence on such person, shall order, in addition to any other sentence imposed \* \* \*, that the person forfeit to the United States all property described in this subsection" (emphasis added).

In arguing that a district court has the discretion to decline to include certain property in an order of forfeiture, petitioner ignores the mandatory language of Section 853(a). Petitioner instead relies on Section 853(c), which provides that any property subject to forfeiture "that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States," unless the third party establishes that he is a bona fide purchaser for value under

the provisions of Section 853(n). Petitioner relies on Section 853(c) even though petitioner has never been in possession of most of the \$170,513 that Reckmeyer owes petitioner, and even though Section 853(c) by its terms grants rights only to "transferee[s]," i.e., persons in the possession of the claimed assets.

Petitioner asserts (Br. 29) that the phrase "may be the subject of an order of forfeiture" in Section 853(c) vests the court with discretion to decline to forfeit assets that have been transferred to a third party. That discretion exists, petitioner argues, even if the defendant is convicted of a covered offense and even if it is established, by proof or by admission (as in this case), that the property satisfies the prerequisites for mandatory forfeiture under Section 853(a). Petitioner further argues (Br. 30) that the court must exercise this supposed "discretion" by declining to order the forfeiture of any property that it previously excluded from the scope of a pretrial restraining order -i.e.that such property "must be immunized from forfeiture upon conviction" (Br. 28). Putting to one side the conceptual difficulties with petitioner's argument in favor of a "discretion" that the court may exercise in only one way, it is clear that subsection (c) was not intended to vest the district court with any such discretion in the first place.

Rather than authorizing district courts to grant dispensation from forfeiture on a discretionary basis, subsection (c) makes it clear that third parties have only narrow and well-defined rights with respect to tainted property in their possession. Subsection (c) first establishes that the government's interest in forfeitable property vests at the time the defendant committed the acts giving rise to the forfeiture. The subsection then sets forth the only circumstance in which a court may afford relief to a third party who has acquired the tainted property after the defendant commit-

The concurring judges in *Monsanto* acknowledged some of the mandatory language in Section (a), but sought to explain it away by stating that the language "by its terms applies only to 'any person convicted' of the referenced crimes." 852 F.2d at 1410; 88-454 Pet. App. 23a. That is no limitation at all, however, since the forfeiture sanction in Section 853 never applies unless the person has been convicted of one of the referenced crimes; thus, the occasion for a court to enter an order of forfeiture does not even arise until the defendant has been found guilty of such an offense. Moreover, that explanation fails to account for the sentence in Section 853(a) that provides that the court, in imposing sentence on a defendant convicted of the referenced crimes, "shall order \* \* that the person forfeit to the United States all property described in this subsection."

ted the crime: the transferee must establish at a hearing pursuant to subsection (n) that "he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under [Section 853]." The narrow grounds for judicial relief set forth in subsection (c) strongly indicate that Congress intended to require the all-encompassing and mandatory provisions of subsection (a) to apply in all other situations in which tainted property is transferred to third parties.

The use of the word "may" in subsection (c), upon which petitioner seizes, does not alter that regime. That word is used in a sentence authorizing the inclusion, in a special verdict of forfeiture, of property that was transferred to a third party after the property became forfeitable because of the criminal conduct of the defendant. Significantly, the next clause of subsection (c) provides that the court "shall" order the forfeiture of any transferred property that is covered by the special verdict. The language on which petitioner relies is therefore simply language of authorization for the jury. Particularly in light of the mandatory directive to order the forfeiture of any property covered by the special verdict, the use of the word "may" does not suggest the existence of a discretionary authority in the court to dispense with forfeiture.

Petitioner's contrary argument appears to rest in part on the incorrect premise that the court enters the special verdict of forfeiture, just as it enters an order of forfeiture. See, e.g., Br. 30 n.16. It is the jury, not the court, that returns a special verdict of forfeiture under Section 853. See Fed. R. Crim. P. 31(e); <sup>13</sup> United States v. Feldman, 853 F.2d 648, 660 (9th Cir. 1988); United States v. Sandini, 816 F.2d 869, 874 (3d Cir. 1987); United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). Compare Fed. R. Crim. P. 23(c) (in a case tried without a jury, the judge makes "findings"). The court then enters its judgment on the basis of the jury's verdict (Fed. R. Crim. P. 32(b)(i)), and if the verdict "contains a finding of property subject to a criminal forfeiture," the judgment "shall" authorize the Attorney General to seize the interest in property subject to forfeiture (Fed. R. Crim. P. 32(b)(2)). See S. Rep. No. 225, supra, at 193-194.

Elsewhere in Section 853 Congress specifically addressed the matter of granting discretionary or equitable relief in order to ameliorate the application of the forfeiture sanction in appropriate circumstances. Subsection (i)(1) provides that the Attorney General is authorized to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section \* \* \*." Congress thus chose to vest the dispensing power not in the courts, but in the Executive Branch, where it traditionally has resided under the forfeiture statutes. See, e.g., United States v. von Neumann, 474 U.S. 242 (1986). In light of this express statutory provision

<sup>12</sup> To the extent that the use of the word "may" in subsection (c) connotes the exercise of a range of choice, the choice is that of the jury in deciding whether the requisite facts are present to return a special verdict of forfeiture and trigger the court's mandatory obligation to enter an order of forfeiture on the verdict.

<sup>&</sup>lt;sup>13</sup> Rule 31(e) provides that if the indictment alleges that an interest or property is subject to criminal forfeiture, "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." This rule does not suggest that the court may defeat forfeiture by declining to submit the issue to the jury.

for the granting of discretionary relief by the Attorney General, and the close relationship between that authority and the President's constitutional "Power to grant Reprieves and Pardons for Offences against the United States" (Art. II, § 2), there is no reason to believe that Congress also intended, sub silentio, to authorize the courts to exercise a virtually identical authority.

This conclusion is strongly reinforced by the portion of subsection (c) that announces that the government's ownership interest in forfeitable property vests at the time of the commission of the crime. It would be extraordinary for Congress, which alone has the power "to dispose of \* \* \* Property belonging to the United States" (Art. IV, § 3, Cl. 1), to confer on a district court the discretion effectively to give away property that belongs to the United States by declining to enter an order of forfeiture and instead allowing a third-party transferee to retain the property. The Court should not read such a remarkable result into Section 853 in the absence of a clear expression of congressional intent to do so.

Petitioner asserts (Br. 29-30) that the legislative history of subsection (c) shows that "it vests the district court with equitable discretion in imposing a forfeiture," but petitioner cites nothing from the legislative history to support that assertion. In fact, the legislative history—unambiguously shows that Congress did not intend to vest the courts with any discretion on the question of forfeiture. The Senate Report states with respect to the identical language in the RICO forfeiture provision (S. Rep. No. 225, supra, at 200):

[T]he final sentence in section 1963(a) emphasizes the mandatory nature of criminal forfeiture, requiring the court to order forfeiture in addition to any other penalty imposed. This is in accord with case law holding the forfeiture provision of the present forfeiture statute to be mandatory on the trial court.

The leading case for that proposition, cited by the Report (id. at 200 n.25), was United States v. L'Hoste, 609 F.2d 796, 809-813 (5th Cir.), cert. denied, 449 U.S. 833 (1980). There, the Fifth Circuit granted the government's petition for a writ of mandamus requiring the district court to order forfeiture of a defendant's interest in a racketeering enterprise. The L'Hoste court reasoned that (1) although the RICO statute used discretionary language to describe the imposition of a fine or imprisonment, it used the mandatory "shall" in reference to forfeiture (609 F.2d at 810); (2) the only discretion conferred on the court "relates to collateral measures dealing with the preservation of the property subject to forfeiture rather than the forfeiture itself" (id. at 811); and (3) "[t]he Attorney General, rather than the court, would appear to have the power and discretion involving the remission and mitigation of forfeiture" (id. at 812).14

The reasons stated in L'Hoste for refusing to recognize discretion in the district court apply with even greater force to the even more explicit statutory language enacted by Congress in the Comprehensive Forfeiture Act of 1984. In any event, Congress's express approval of the decision in L'Hoste requires that Section 853 be read in the same way. See S. Rep. No. 225, supra, at 211. Consistent with this clear congressional intent, other courts of appeals have consistently held that forfeiture is mandatory. See

Ninth Circuit reversed a district court order declining to order forfeiture of property because the defendant's wife had recently given birth to a child and the family would need some source of support. United States v. Godoy, 678 F.2d 84, 87-88 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983). The Ninth Circuit found the reasoning of L'Hoste compelling and adopted that court's holding that "the forfeiture provisions of § 1963(a) are mandatory, leaving no discretion in the district court" (id. at 88).

United States v. Perholtz, 842 F.2d 343, 369 (D.C. Cir. 1988); United States v. Busher, 817 F.2d 1409, 1414 (9th Cir. 1987); United States v. Kravitz, 738 F.2d 102, 134-106 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Hess, 691 F.2d 188, 190 (4th Cir. 1982).

The reasons for this mandatory rule are not diminished when the property has been transferred to a third party. To the contrary, as the Senate Report explains, the procedure established by subsection (c) in those circumstances "provides for more orderly consideration both of the forfeiture issue and the legitimacy of third party claims" (S. Rep. No. 225, supra, at 201). "Moreover, even if a transfer is sustained at the ancillary hearing [under subsection (n)], the fact that the jury will have determined that the property would have been forfeitable if it had remained in the hands of the defendant will allow the court to order the forfeiture of substitute assets of the defendant [under subsection (p)(2)], to assure that the defendant does not retain the gain from this pre-conviction transfer" (ibid.).

2. Petitioner attempts to avoid the statutory mandate that an order forfeiting all tainted property to the United States be included in the court's final judgment by invoking the asserted discretion of the district court in deciding whether to issue or modify a pretrial restraining order under subsection (e)(1)(A). Specifically, petitioner argues (Pet. Br. 12-18) that the language in subsection (e)(1)(A) stating that a court "may" issue a restraining order after the indictment has been returned gives the court discretion to exclude some assets from the scope of such an order. Indeed, in petitioner's view (Pet. Br. 19-28), the district court must exercise that discretion to exclude from a pretrial restraining order any assets that the defendant wishes to use to pay "ordinary" living expenses, in which petitioner includes the \$170,513 in legal fees that Reckmeyer incur-

red over the course of only several months. On these premises, petitioner reasons that the court must have the discretion to exclude those assets from the final judgment of forfeiture as well, because any other construction "would essentially nullify the district court's equitable authority to permit defendants to make ordinary lawful expenditures under Section 853(e)(1)." Pet. Br. 30, quoting Monsanto, 852 F.2d at 1410 (Winter, J., concurring) (88-454 Pet. App. 22a). This argument stands the statutory scheme on its head by rendering the trial and entry of final judgment merely ancillary to and in aid of action taken by the court at a preliminary stage of the case.

a. Petitioner's argument that a court can effectively grant a permanent exemption from forfeiture when it decides whether to issue a temporary restraining order is refuted by the text of subsection (e)(1)(A), which authorizes a court to issue a restraining order only to "preserve the availability of property described in subsection (a) \* \* \* for forfeiture \* \* \* in the event of conviction." See also S. Rep. No. 225, supra, at 204 ("The sole purpose of the bill's restraining order provision \* \* \* is to preserve the status quo, i.e., to assure the availability of the property pending disposition of the criminal case."). It would be inconsistent with the limited purpose contemplated for restraining orders under the statute to permit the denial of a restraining order to have the effect of conclusively exempting any assets not covered by a restraining order from forfeiture in the event that the defendant is convicted. As this Court has observed, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are

less formal and evidence that is less complete than in a trial on the merits \* \* \*. In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981) (citations omitted).<sup>15</sup>

Thus, a defendant who is not under a restraining order would not violate any court order if he subsequently disposed of whatever interest he might have in the property, but both the defendant and his transferee would assume the risk in such a transaction that the defendant might ultimately be convicted and that the jury might return a special verdict of forfeiture. In spite of the denial of a restraining order, the verdict of forfeiture would require the court to order the property forfeited to the United States unless the transferee established under subsection (n) that he was a bona fide purchaser for value without reason to believe that the property was subject to forfeiture. In other words, both the defendant and the transferee would assume the risk that the United States' claim of superior title to the property, as set forth in the

indictment, might ultimately prevail, and that the defendant might thereby be shown to have had no interest in the property that he could convey to the transferee.

The purposes of that rule apply with special force in this context, where the property transferred to a third party allegedly constitutes the illicit proceeds or instruments of narcotics trafficking and is the subject of a criminal prosecution as a result. Nor is there any basis for a special exception to that rule for situations in which it is an attorney who accepts the assets from the defendant with knowledge or cause to believe that they are tainted by illegality and that all right to the assets therefore has already vested in the United States. To the contrary, an attorney can be expected to be especially familiar with the legal principles that prevent a third party from acquiring good title in such circumstances and to comprehend the significance of the notice of illegality and forfeiture furnished by the charges in the indictment. In addition, there is an important public interest in assuring public confidence in the integrity of the defense bar and the criminal justice system that particularly warrants a rule barring attorneys from receiving the illicit proceeds and instruments of drug trafficking in payment of their fees.

b. To be sure, a court considering a request for a restraining order does enjoys some measure of equitable discretion as to whether to enter such an order and what provisions the order should contain. Thus, in proper circumstances, a court might deny the government's request for injunctive relief altogether, or it might restrain less than all of the defendant's property – perhaps because the government had not sufficiently shown that such relief was required to preserve the property for forfeiture. But in that event, the court would simply have declined to employ judicial sanctions to maintain the status quo pendente lite.

<sup>15</sup> Petitioner's reliance on subsection (e)(1)(A) as the basis for its notion that the district court may exempt property from a final judgment of forfeiture also gives rise to anomalies. The district court's authority under subsection (e)(1)(A) may be exercised only "[u]pon application of the United States • • •." Thus, even under petitioner's theory, if the United States does not apply for a pretrial restraining order, there is no mechanism by which the court can release or exclude property from pretrial restraint as a predicate for exempting it from a final judgment of forfeiture. For this reason, petitioner's construction of subsection (e)(1)(A) could deter the United States from seeking injunctive relief for fear that the district court would seize the opportunity not only to deny preliminary relief, but also to immunize assets from forfeiture altogether. This deterrent effect would further undermine Congress's purpose to strengthen the restraining-order provisions in 1984.

An exercise of discretion of that sort has nothing to do with the duty that petitioner would impose on the court to exempt "living expenses" from the restraining order and the concomitant duty to exempt from the final order of forfeiture any such "living expenses," including attorneys' fees, that were excluded from the reach of the restraining order. That exercise of "discretion" has no basis in equity practice, and it is contrary to the language and purposes of Section 853(e)(1).

The key premise underlying petitioner's argument that the court must exercise its discretion in favor of exempting "living expenses" from any restraining order is that the balance of hardship favors the defendant, not the government. We doubt that it imposes an unreasonable hardship on a defendant to prohibit him from enjoying the economic benefits of his criminal activities, once a grand jury has found probable cause to believe that the identified property is forfeitable. But in any event, Section 853(e)(1) clearly contemplates that the task of balancing the hardship to the individual against the need to preserve the property that is subject to forfeiture is no longer appropriate once the indictment has been returned.

Subsection (e)(1)(B), which governs requests for preindictment restraining orders, provides that the court may issue a restraining order only if it finds that there is a substantial probability that the United States will prevail on the issue of forfeiture, that failure to enter the order will result in the property's being unavailable for forfeiture, and that "the need to preserve the availability of the property through entry of the requested order outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. 853(e)(1)(B)(ii) (Supp. IV 1986). By contrast, subsection (e)(1)(A), which governs requests for postindictment restraining orders, does not

provide for the court to balance the need to preserve the property against the hardship to the defendant; it authorizes the court to issue a restraining order based solely on the need to preserve the property. This difference in the statutory text is sufficient in itself to establish that Congress did not intend the possible hardship to the defendant to play much (if any) role in shaping the restraining order after indictment—much less that Congress intended the courts routinely to permit defendants to invade the property subject to forfeiture, as petitioner urges. Cf. United States v. Erika, Inc., 456 U.S. 201, 208 (1982).

The legislative history confirms this interpretation. The Senate Report states that "the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order" (S. Rep. No. 98-225, supra, at 202). And after describing the balance-of-hardship test applicable to preindictment restraining orders, the Report states: "It is stressed, however, that this stringent standard applies only in this context; it is not to be extended to restraining orders sought after indictment" (id. at 203).

c. Finally, petitioner is wrong in contending (Br. 24-27) that the interests underlying the forfeiture sanction would not be undermined by allowing the defendant to invade forfeitable assets to pay his living expenses and attorneys' fees. Because Section 853(a) requires the forfeiture of "any" and "all" property that constitutes the proceeds of or afforded the defendant with a source of control over the continuing criminal enterprise, and because the express purpose of subsection (e)(1)(A) is to "preserve" the availability of property for forfeiture in the event the defendant is convicted, it is "beyond dispute that any transfer to a third party of property otherwise subject to a restraining order frustrates, to the precise extent of the

property transferred, the expressly stated statutory purpose." *Monsanto*, 852 F.2d at 1411 (Mahoney, J., dissenting) (88-454 Pet. App. 30a).<sup>16</sup>

In sum, the statute that petitioner describes in its brief is simply not the statute that Congress passed. Section 853 does not grant district courts the discretion to relieve defendants of forfeitures; it does not require district courts to exclude "ordinary living expenses" from the reach of post-indictment restraining orders; and it does not require the court to exclude from a final judgment of forfeiture any property that was excluded from the coverage of a restraining order entered earlier in the litigation.

II. THE CONSTITUTION DOES NOT REQUIRE CONGRESS TO FASHION A SPECIAL EXCEPTION TO THE UNIFORM RULE OF MANDATORY FORFEITURE FOR THOSE TAINTED ASSETS THAT THE DEFENDANT WANTS TO USE TO PAY AN ATTORNEY

Petitioner contends (Br. 33-46) that Section 853 is unconstitutional to the extent that it does not permit a court to exempt from forfeiture assets that the defendant wants to use to pay defense counsel. "Judging the constitutionality of an Act of Congress is properly considered "the gravest and most delicate duty that this Court is called upon to perform," "and the "duly enacted and carefully considered decision of a co-equal and representative branch of our Government" is entitled to substantial deference. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985), quoting Rostker v. Goldberg, 453 U.S. 57, 64 (1981), and Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.). That is especially so in this case, where Congress enacted the statutory provisions in an effort to address the grave national problem of narcotics trafficking by enacting a measure that is designed to strip all profits from those who engage in that trade and to remove the tainted proceeds and other property associated with it from the channels of commerce.

Contrary to petitioner's contention, neither the Fifth Amendment nor the Sixth Amendment requires Congress to fashion a special exception to the uniform and mandatory forfeiture sanction under Section 853 in order to permit Reckmeyer and other defendants to use the illicit proceeds and instruments of their narcotics trafficking to pay legal fees. Nor does either Amendment require Congress to allow an attorney to receive such assets in payment of his fees, where the attorney knew or had reason to know that the assets were illegally derived and that title to the assets therefore was already vested in the United States.

# A. Section 853 Does Not Impermissibly Interfere With The Defendant's Sixth Amendment Right To The Assistance Of Counsel

1. Petitioner argues (Br. 34-42) that applying Section 853 to assets that the defendant would like to use to pay an attorney violates the Sixth Amendment right to the assistance of counsel. Petitioner does not dispute the conclusion by the en banc court below that Section 853, in its general operation, "poses no threat whatsoever to the ab-

<sup>16</sup> Contrary to petitioner's contention (Br. 24), the purpose of subsections (a) and (e)(1) in this regard is not only to ensure that the defendant does not benefit from the tainted assets, but also to furnish an important source of revenue for the Department of Justice Assets Forfeiture Fund, which was also established by the 1984 Act. See 28 U.S.C. 524(c) (Supp. IV 1986), as amended by the Asset Forfeiture Amendments Act of 1988 (Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6071-6080 102 Stat 4320-4327). That Fund is used to defray the costs of and furnish an incentive for forfeiture actions, as well as to support various law enforcement activities. See S. Rep. No. 225, supra, at 197, 198, 216-217; H.R. Rep. No. 845 (Pt. 1), 98th Cong., 2 Sess. 7, 13, 23-25 (1984).

solute right to be represented by counsel" (Pet. App. 8a). That right is the core guarantee of the Sixth Amendment (see United States v. Cronic, 466 U.S. 648, 653 (1984)). and it "has come to mean that a criminal defendant has the absolute right to representation either by retained counsel or by appointed counsel in a proceeding that threatens imprisonment" (Pet. App. 9a (emphasis in original)). See Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). If a pretrial restraining order or the possibility of postconviction forfeiture of assets should render a particular defendant financially unable to retain private counsel, his absolute right to representation will be protected by the appointment of counsel under the Criminal Justice Act, 18 U.S.C. 3006A. See Pet. App. 9a: Nichols, 841 F.2d at 1506. If the appointed counsel fails to provide reasonably competent assistance and the defendant is thereby prejudiced, the deprivation of constitutionally effective representation will be remedied by the order of a new trial. Strickland v. Washington, 466 U.S. 668 (1984); Perry v. Leeke, 109 S. Ct. 594, 599-600 (1989); see also Moya-Gomez, 860 F.2d at 725. Thus, nothing in Section 853 has any effect on the core component of the Sixth Amendment guarantee.

Petitioner's objection is that the authority of a court to restrain the disposition of all allegedly tainted assets, including those that the defendant might want to use pay a lawyer, will render the defendant unable "to pay or assure payment to a lawyer" (Br. 39) and thereby create a "risk of non-payment" of fees (Br. 35). That risk may in turn prompt a private attorney to decline to accept the case. Even in the absence of a restraining order, petitioner contends (Br. 34, 35, 40) that the mere possibility that any assets identified in the indictment that are transferred to an

attorney might be forfeited to the United States would be sufficient to deter a private attorney because of the uncertainty over whether he would receive his fee. In petitioner's view, this effect of Section 853 impermissibly interferes with the defendant's qualified right under the Sixth Amendment "to select and be represented by one's preferred attorney." Wheat v. United States, 108 S.Ct. 1692, 1697 (1988).

An an initial matter, we fail to see how petitioner can claim that there was any such violation in this case, since Reckmeyer in fact was represented by counsel of his choice in the prosecution. See *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984). Petitioner presumably has a contract claim against Reckmeyer for \$170,513 in unpaid legal fees for that representation, but petitioner's failure to recover on that claim out of assets that Reckmeyer voluntarily forfeited to the United States does not violate *Reckmeyer's* Sixth Amendment rights. Compare *Nichols*, 841 F.2d at 1497-1498.<sup>17</sup> On the assumption that the counsel-of-choice issue is properly presented in this case, however, we shall now show that the en banc court below

<sup>17</sup> Although Reckmeyer claimed in his March 7, 1985, motion to modify the restraining order that sufficient assets should be released to him so that he could use them to pay petitioner, Reckmeyer relinquished that claim when he pleaded guilty and agreed to forfeit to the United States all of the property identified in the indictment, including any that he might have used to pay attorneys' fees. The en banc court of appeals nevertheless held that petitioner has standing to invoke Reckmeyer's Sixth Amendment rights in seeking the release of a portion of that property from the final judgment of forfeiture to pay its fees (Pet. App. 7a-8a). Although in some circumstances it might be appropriate for counsel to assert the Sixth Amendment rights of his client in the fee context, counsel should not be permitted to do so in a case such as this one, where the client has relinquished his opportunity to advance the same claim. Compare *Hodel v. Irving*, 481 U.S. 704, 711-712 (1987).

was correct in "declin[ing] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (Pet. App. 15a).

2. In Wheat, the Court sought to place the defendant's interest in being represented by a particular lawyer in its proper constitutional context. The Court first stressed that "the purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial," 108 S.Ct. at 1696-1697, quoting Strickland v. Washington, 466 U.S. at 689, and "that in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such," id. at 1607, quoting United States v. Cronic, 466 U.S. 461, 657 n.21 (1984). See also Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (Sixth Amendment does not guarantee "a meaningful attorney-client relationship"). For that reason, the Court held in Wheat that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." 108 S. Ct. at 1697. Similarly, in Powell v. Alabama, 287 U.S. 45 (1932), the Court stated only that "a defendant should be afforded a fair opportunity to secure counsel of [the defendant's] own choice," id. at 53, not that a defendant has an absolute right to do so, and that a court would violate "due process in the constitutional sense" if it "were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him," id. at 69 (emphasis added).18

Consistent with these principles, the Court made clear in Wheat that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." 108 S. Ct. at 1697. In fact, the Court has recognized in a number of settings that a court may take appropriate measures in aid of the judicial process in criminal cases even though those steps may have the direct consequence of preventing the defendant from being represented by his preferred counsel. For example, in Wheat itself the Court sustained an order disqualifying the defendant's lawyer, and the Court has held that a defendant has no right to be represented by an attorney whose schedule cannot be adjusted to the requirements of the court's docket, Morris v. Slappy, 461 U.S. at 11-12, or by a person who is not a member of the bar, Leis v. Flynt, 439 U.S. 438 (1979). 19 In these situations, the defendant's inability to retain the counsel of his choice is the incidental consequence of the invocation of rules or principles of general applicability (rules of professional ethics, the requirements of orderly judicial administration, and bar membership) that serve important public purposes. Because the defendant's loss of the counsel of his choice is the result of policies that promote general public interests and is not the product of an effort to disrupt the defendant's relationship with any

<sup>&</sup>lt;sup>18</sup> Accord Crooker v. California, 357 U.S. 433, 439 (1958); see also Chandler v. Fretag, 348 U.S. 1, 10 (1954) ("a defendant must be given a reasonable opportunity to employ and consult with counsel").

<sup>&</sup>lt;sup>19</sup> See also Pet. App. 13a; Ford v. Israel, 701 F.2d 689, 692-693 (7th Cir. 1983).

The conclusion that the Sixth Amendment permits reasonable regulation of the bar, and therefore of a party's right to select a particular member of the bar to represent him, is strongly supported by Section 32 of Judiciary Act of 1789, § 35, 1 Stat. 92. Section 35, which is now codified at 28 U.S.C. 1654, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." Compare Faretta v. California, 422 U.S. 806, 831 (1975).

particular lawyer, these cases do not result in an "arbitrary" interference with the representation of the defendant by his preferred counsel. In such cases, the defendant has been afforded a "fair opportunity" to secure counsel of his own choice within the framework of those general rules.

Ouite aside from the restrictions that may properly be imposed by the government itself on the defendant's right to select a particular lawyer to represent him, various legal or practical circumstances confronting the particular defendant or his preferred lawyer at the time the criminal charges are brought may render it impossible for that lawyer (or even any private attorney) to represent the defendant. Of special relevance to this case, the Court emphasized in Wheat that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant" (ibid.). For example, as the court below pointed out, counsel may decline to take the case because of uncertainty about whether the defendant will be able to pay his fee. See Pet. App. 13a. It is, of course, axiomatic that a defendant's ability to be represented by counsel of his choice is, as a practical matter, limited by the fee the defendant can afford to pay. Morris v. Slappy, 461 U.S. at 23 & n.5 (Brennan, J., concurring).

3. In light of these principles, Section 853 does not impermissibly interfere with a defendant's right to have a fair opportunity to select and be represented by his preferred attorney.

Petitioner argues that the Sixth Amendment requires that any assets identified in the indictment as subject to forfeiture must be exempted from a final judgment of forfeiture if the defendant wants to use them to pay his lawyer.<sup>20</sup> In effect, petitioner argues that a defendant's in-

vocation of his Sixth Amendment right to the assistance of counsel requires the court to dismiss a portion of the underlying indictment. The effect of this principle would be to read into the Sixth Amendment, which was intended to embody the procedures that are required in a criminal prosecution (see Faretta, 422 U.S. at 818), a substantive defense to the charges on which that prosecution is based. Under petitioner's theory, insofar as the forfeiture charges in the indictment are concerned, the assistance of counsel rendered to the defendant would not be "for his defence," as the Sixth Amendment provides; it would be "his defence." There is no reason to believe that the Framers of the Sixth Amendment intended it to confer on the defendant an immunity to liability for primary conduct occurring outside the context of the criminal prosecution. Cf. Thomas v. Arn, 474 U.S. 140, 146-147 & n.5 (1985).

Moreover, subsection (a) of Section 853 does not provide for the forfeiture of "attorneys' fees" as such. It provides for the forfeiture of certain of the defendant's property-in this case, all property that represented the illicit proceeds of Reckmeyer's narcotics trafficking or that afforded him a source of control over the continuing criminal enterprise. The statute mandates forfeiture based on the origins of the property, not the purposes to which the defendant wishes to devote it, and it does so to further compelling public purposes of general applicability that are unrelated to the attorney-client relationship as such. Cf. United States v. O'Brien, 391 U.S. 367, 377 (1968). As a result, Section 853 does not arbitrarily single out attorneys or their fees for adverse treatment: the defendant is equally barred from spending assets identified in the indictment to purchase a house, a vacation, an automobile, groceries, or the assistance of an accountant. See Nichols, 841 F.2d at 1504-1505. Thus, petitioner is wrong in asserting (Br. 38) that the government here "seeks to deprive a

<sup>&</sup>lt;sup>20</sup> Fed. R. Crim. P. 7(c)(2) requires the indictment to specify any property that will be subject to criminal forfeiture.

defendant of the ability to retain private counsel of any kind."

Nor do the forfeiture provisions impose an affirmative governmental bar to representation by an attorney the defendant has selected to represent him; any inability of the defendant to receive the services of a particular attorney results from the attorney's private decision to refuse to accept the employment in light of the uncertainty occasioned by the defendant's financial and other circumstances - circumstances that in turn are attributable to the defendant's alleged commission of acts that automatically give rise to forfeiture. The operation of Section 853 therefore is quite unlike the disqualification order in Wheat, which constituted a direct governmental prohibition against the defendant's selection of a particular lawyer to represent him, but which nevertheless was sustained by this Court. It also is quite unlike the situation described in Powell v. Alabama, where the Court stated that a court would violate due process if it were arbitrarily to "refuse" to hear a party by the counsel he had retained. Rather, this case falls squarely within the scope of the Court's recognition in Wheat that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." 108 S.Ct. at 1697.21

It also is significant that the statutory provisions that are said to render a defendant unable to afford an attorney

order to preserve his ability to show in a postconviction hearing under subsection (n) that he was reasonably without cause to believe that the property was subject to forfeiture. Petitioner, however, has elsewhere conceded (see Br. 31, 34) that virtually no defense counsel in a criminal prosecution could satisfy that standard because the indictment would provide ample notice that the assets are subject to forfeiture. This supposed conflict therefore is remote. Petitioner also suggests (Br. 36) that a lawyer might have a conflict of interest if an occasion arose for the defendant to enter into a guilty plea that required him to forfeit substantial assets. No such claim of ineffective assistance of counsel could be raised in this case, however, because Reckmeyer pleaded guilty under just such an agreement. Moreover, as the court below observed (Pet. App. 18a-19a), this Court rejected a similar contention in Evans v. Jeff D., 475 U.S. 717, 727-729 (1986). that allowing waivers of fees would lead lawyers to violate their ethical duties to their clients.

Finally, petitioner contends (Br. 36-37) that the operation of the forfeiture sanction "closely resemble[s]" a contingent fee, which is ordinarily barred in a criminal cases. ABA Model Rule 1.5(d)(2); ABA Model Code DR 2-106(C). But petitioner does not contend that the fees it charged Reckmeyer at hourly rates actually were contingent upon the outcome. Moreover, the fact that the lawyer's ability to collect his fee might be affected by the outcome of the case does not mean that the fee itself is contingent. There presumably are many instances in which the prospects of recovering a fee in a criminal case are greatly diminished as a practical matter by a conviction, since the defendant might be unable to work and be financially ruined. In addition, the prohibition against contingent fees rests in large part on the public interest in avoiding any temptation to corrupt the legal system (see ABA Model Standards for Criminal Justice: The Defense Function, Standard 4.33(a), at p. 4-37), rather than protecting the interests of the defendant. In any event, a contingent fee does not necessarily raise constitutional concerns, and Congress reasonably could conclude that the integrity of the criminal justice system would be better served by tolerating an arrangement that might "resemble" a contingent fee, than by allowing attorneys to accept drug money in payment of their fees.

<sup>&</sup>lt;sup>21</sup> In addition to arguing that attorneys will be deterred from accepting a case involving forfeiture counts because of uncertainties about collecting their fees, petitioner also contends (Br. 35-37) that attorneys who did accept such cases would face ethical dilemmas. See also ABA Br. 17-22. As the court below concluded, any such claims should be considered in the context of an individual case; the possibility that they might arise in some hypothetical case is no justification for holding an Act of Congress unconstitutional. Pet. App. 18a-19a. In any event, the ethical concerns petitioner raises are speculative.

Petitioner suggests (Br. 36), for example, that a defendant would be disserved if the lawyer sought to remain ignorant of relevant facts in

or to lead an attorney to decline to accept his case embody well-established principles of property law in general and forfeiture law in particular. When Congress enacted Section 853(c) in 1984, it expressly incorporated into that provision what it called the "taint" theory of this Court's decision almost 100 years ago in Stowell v. United States, 113 U.S. 1, 19 (1890). See 88-454 U.S. Br. 26-27. The indictment gives the attorney (and any other third party with reason to know of it) ample notice of the government's superior title. There is no arbitrariness or novelty in a rule that the defendant cannot give (and a third party with notice cannot receive) good title if the property identified in the indictment is ultimately found to belong to someone else. See Utah v. United States, 284 U.S. 534, 542-543 (1932); Uniform Commercial Code § 2-403; 3 Anderson, Uniform Commercial Code § 2-403:17 (1983); Tiffany, The Law of Real Property, §§ 1294, 1328 (1939).

The indictment in this case not only put petitioner on notice that the assets in question belonged to the United States rather than Reckmeyer; it also formally charged that those assets were the illicit proceeds of Reckmeyer's drug activities or were otherwise unlawfully associated with those activities. The Constitution requires only that a court afford a defendant a "fair opportunity to secure counsel of [his] choice" (Powell v. Alabama, 287 U.S. at 53), using whatever assets he has at his lawful disposal. A defendant is not denied that "fair opportunity" if he is prevented as a practical matter from spending assets that there is probable cause to believe are illegal and no longer his own. See Walters v. National Ass'n of Radiation Survivors, 473 U.S. at 370 (Stevens, J., dissenting) (in a criminal case, the Sixth Amendment protects "the individual's right to spend his own money to obtain the advice and assistance of independent counsel"). The absence of any such unfairness is now especially evident in this case, since Reckmeyer agreed as part of his guilty plea that the property did consist of the proceeds of his drug activities or afforded him a source of control over the continuing criminal enterprise.

If Reckmeyer had robbed a bank and had been found with \$170,000 of the proceeds in his possession, he plainly would not have had a Sixth Amendment right to spend the \$170,000 to hire an attorney. Indeed, the respondent in Monsanto concedes (88-454 Resp. Br. 37) that the government would have a "compelling" interest in securing the return of that money and preventing the robber from using it for any purpose, even to hire an attorney. The result should be no different where, as here, the assets are the illicit proceeds or instruments of drug trafficking. Pet. App. 13a-14a. Indeed, if Reckmeyer had been found in the possession of \$170,000 worth of drugs or narcotics manufacturing equipment, it could not seriously be maintained that he would have had a Sixth Amendment right to have the government sell the drugs or the equipment and give the proceeds to him so that he could pay an attorney for legal services. Neither Reckmeyer nor petitioner obtained any constitutional rights by virtue of Reckmeyer's conversion of the contraband into cash and other property.

Finally, there are substantial reasons of public policy underlying the forfeiture provisions that militate against the novel expansion of the qualified right to counsel of choice that petitioner urges. "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of the undeserved power may be the ability to command high-priced legal talent" (Pet. App. 21a). Furthermore, the public has a compelling interest in deterrence, and a "drug kingpin's certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars may make him less

apprehensive about continuing in his business" (*ibid.*). Accord *Nichols*, 841 F.2d at 1505. "Public confidence in the administration of justice might be a casualty of exempting attorney's fees from forfeiture," because "[p]ublic cynicism and distrust of the legal system might grow as citizens watched huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege" (Pet. App. 21a-22a).

## B. The Due Process Clause Of The Fifth Amendment Does Not Require An Exception To Section 853

Petitioner finally contends (Br. 43-45) that the forfeiture of assets that the defendant wants to use to pay attorneys' fees violates the Due Process Clause because it gives the government the power to decide, for tactical reasons, whether a defendant will be represented by a particular counsel of his choice, and thereby upsets the "balance of the forces between the accused and his accuser,' " (Br. 43, quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973). The en banc court below correctly answered this contention (Pet. App. 19a):

[T]he possibility that a prosecutor might abuse the forfeiture statutes in a particular case does not justify holding all fee forfeiture unconstitutional. Courts have ample tools for dealing with situations where prosecutorial misconduct threatens the fairness of a trial. Due process claims of this type must, however, be dealt with on specific facts. Every criminal law carries with it the potential for abuse, but a potential for abuse does not require a finding of invalidity.

See also Nichols, 841 F.2d at 1508. That is the same approach this Court took last Term in Wheat in response to

the contention that the government might seek to "manufacture" a conflict of interest in order to prevent a defendant from retaining a particularly able defense counsel: the Court noted that the trial courts are undoubtedly aware of this possibility, and it cautioned them to take it into account, along with other factors, in ruling on disqualification motions. 108 S. Ct. at 1699.

Petitioner does not suggest that there was any abuse in this case, such as adding forfeiture allegations for the purpose of causing petitioner to withdraw or otherwise seeking an unfair advantage over Reckmeyer. In light of the scale of Reckmeyer's operation and the amount of property he conceded was forfeited to the United States, no such claim could plausibly be made.

Nor has petitioner pointed to any such abuse in any other case. Undocumented speculation that a prosecutor might abuse his authority in another case furnishes no basis for holding an Act of Congress unconstitutional across the board in its application to cases in which the defendant seeks to use forfeitable assets to pay attorneys' fees. United States v. Salerno, 481 U.S. 739, 745, 752 (1987).

Unlike Wardius, this case does not involve the validity of a procedural rule affecting discovery in a criminal prosecution; petitioner asks this Court to immunize certain defendants from a critical aspect of their substantive liability for the underlying criminal offense. The court should be especially reluctant to invalidate an Act of Congress that imposes a sanction for primary conduct away from the courtroom simply because the sanction has some incidental effect on the conduct of litigation. Congress has adopted a broad forfeiture remedy because it considers that remedy to be essential to achieve the purposes of the narcotics laws. And, as we have shown, the forfeiture remedy does not offend any particular constitutional pro-

vision designed to protect a criminal defendant from government oppression, such as the Sixth Amendment right to the assistance of counsel. In those circumstances, applying the forfeiture statute according to its terms does not violate the general constitutional guarantee to due process.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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#### APPENDIX

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides:

No person \* \* \* shall \* \* \* be deprived of life, liberty, or property, without due process of law; \* \* \*

2. The Sixth Amendment of the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the Assistance of Counsel for his defence.

Section 853 of Title 21, United States Code (Supp. IV 1986) provides:

#### Criminal forfeitures

## (a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

- (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
- (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
- (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addi-

tion to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

## (b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes –

- (1) real property, including things growing on, affixed to, and found in land; and
- (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

# (c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reason-

ably without cause to believe that the property was subject to forfeiture under this section.

## (d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

- (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
- (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

#### (e) Protective orders

- (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—
  - (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
  - (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to

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have an interest in the property and opportunity for a hearing, the court determines that —

- (i) there is substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
- (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

#### (f) Warrants of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

#### (g) Execution

Upon entry of an order of forfeiture under this section. the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

## (h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

## (i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

- (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;
  - (2) compromise claims arising under this section;
- (3) award compensation to persons providing information resulting in a forfeiture under this section;
- (4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this

section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

## (j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

#### (k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

- (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
- (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

#### (/) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

## (m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

## (n) Third party interests

- (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
- (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
- (3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent

of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

- (4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.
- (5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.
- (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that
  - (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of-forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
  - (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and

was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

#### (o) Construction

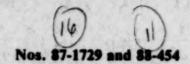
The provisions of this section shall be liberally construed to effectuate its remedial purposes.

## (p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant —

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
  - (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).



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MAR 10 1989

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

ν.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

ν.

PETER MONSANTO

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND SECOND CIRCUITS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1729

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

ν.

UNITED STATES OF AMERICA

No. 88-454

UNITED STATES OF AMERICA, PETITIONER

ν.

PETER MONSANTO

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND SECOND CIRCUITS

#### SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 35.5 of the Rules of this Court, we respectfully file this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Eleventh Circuit in *United States* v. *Bissell*, No. 87-8246 (Mar. 2, 1989). The Eleventh

We have lodged ten copies of the opinion in Bissell with the Clerk of this Court.

Circuit there rejected the defendants' contention that their convictions under the federal drug laws should be reversed because the pretrial restraint of assets under 21 U.S.C. 853(e)(1)(A) and (f) (Supp. IV 1986) prevented them from using restrained assets to hire a lawyer. The court addressed four issues that are relevant to the instant cases.

First, the court in *Bissell* concluded that "[t]he language and legislative history of section 853 evidence Congress' goal of reaching as many illegal assets as constitutionally permissible," and it therefore held that Section 853 "reaches all illegal funds, including those earmarked for payment to attorneys." On this point, the court expressly agreed with the decisions of the Fourth, Seventh, and Tenth Circuits in *Caplin & Drysdale*, *Moya-Gomez*, and *Nichols*. Slip op. 1593.

Second, the court rejected the contention that the pretrial restraints deprived the defendants of an opportunity, protected by the Sixth Amendment, to retain counsel of their choice. Slip op. 1593-1595. As an initial matter, the court explained that the United States was not a mere creditor, for whom assets were restrained to secure payment of a debt owed to it by the defendants. Rather, the court stressed, by virtue of the provision in Section 853(c) that vests title in the United States as of the time the defendant commits the act giving rise to forfeiture, the indictment in Bissell effectively charged that "none of the defendants have ever owned any of these assets," because "[a]ll of the assets were the property of the government the moment they were derived from, or utilized in, the criminal activities condemned." Slip op. 1594. On this

basis, the court found no Sixth Amendment violation. The court reasoned that the Sixth Amendment affords a defendant only "the opportunity to select his own counsel at his own expense," not the "right to use assets to the extent that those assets belonged to the United States." Id. at 1594-1595 (emphasis in original; citation omitted). The fact that a defendant cannot afford private counsel as a result of the operation of Section 853 "is of no Sixth Amendment significance," the court concluded, because "a defendant may not insist on representation by an attorney he cannot afford," and because his fundamental right to the assistance of counsel will be protected through appointment of counsel, if necessary. Id. at 1595.

Third, applying the four-part test of Barker v. Wingo, 407 U.S. 514 (1972), and United States v. \$8,850, 461 U.S. 555 (1983), the Eleventh Circuit held in Bissell that the defendants' due process rights were not violated by the postponement of a post-restraint hearing until the criminal trial itself. Slip op. 1595-1598. The court reasoned that: (1) the eight-month period between the imposition of restraints and the trial was not excessive (slip op. 1597); (2) there were substantial reasons for not holding a full-blown hearing on the merits of the government's case until trial, because of the potential for jeopardizing the safety of witnesses and premature disclosure of the government's case (slip op. 1597); (3) the defendants did not contend that the seizures and other restraints were unsupported by probable cause or applied to assets beyond the scope of the indictment (slip. op. 1597-1598); and (4) the effect of the restraints on the defendants' Sixth Amendment interest in retaining counsel of their choice must be considered in light of the United States' claim of title to the same assets and the district court's exercise of control through its issuance of restraining orders or seizure warrants, which provide a significant check on the government's power to

<sup>&</sup>lt;sup>2</sup> In re Forfeiture Hearing As To Caplin & Drysdale, 837 F.2d 637, 641-642 (4th Cir. 1988) (en banc), cert. granted, No. 87-1729 (Nov. 7, 1988); United States v. Moya-Gomez, 860 F.2d 706, 728 (7th Cir. 1988); United States v. Nichols, 841 F.2d 1485, 1491-1496 (10th Cir. 1988).

restrain legitimate assets (slip op. 1598-1599, citing Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)).

Fourth, following the reasoning in Caplin & Drysdale, 837 F.2d at 648, and Nichols, 841 F.2d at 1508, the Eleventh Circuit held that the mere possibility of prosecutorial abuse does not render the forfeiture statute itself unconstitutional. In the court's view, any allegations of abuse can be adequately considered in the circumstances of a particular case. Because no prosecutorial bad faith was evident in Bissell and because the district court had made a determination of probable cause, either on its own or upon the grand jury's return of the indictment, the Eleventh Circuit found no improper denial of the defendants' qualified Sixth Amendment right to the assistance of counsel of their choice. Slip op. 1599-1600.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

**MARCH 1989** 

No. 87-1729

Supreme Court, U.S.

FILED

MAR 14 1989

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

Caplin & Drysdale, Chartered,

Petitioner.

V.

UNITED STATES OF AMERICA

# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

#### REPLY BRIEF FOR THE PETITIONER

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## IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1729

CAPLIN & DRYSDALE, CHARTERED,

Petitioner.

V.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. THE COMPREHENSIVE FORFEITURE ACT OF 1984 AUTHORIZES PETITIONER TO RECOVER ITS FEES FROM DEFENDANT RECKMEYER'S FORFEITED AS-SETS

In arguing that the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 2301, 98 Stat. 2044, 2192-2193 ("the 1984 Act") authorizes, indeed requires, denying our claim to the fees and expenses incurred in defending Christopher Reckmeyer against CCE and tax evasion charges, the government contends (i) that we are improperly asserting rights previously abandoned by our client and (ii) that, in any event, the federal courts have no discretion under the statute to exempt from forfeiture assets which the defendant seeks to use to pay for necessary living expenses and attorneys fees prior to his conviction for the offenses on which the pro-

posed asset forfeiture is based. As shown below, both lines of argument are unavailing.

# A. Petitioner Is Not Barred From Advancing Its Statutory Claim

The government's threshold contention (U.S. Br. 11, 16-19) is that we are foreclosed from making the statutory argument that constitutes the principal submission of our opening brief (Pet. Br. 11-33). The government bases this contention on two alternative theories. First, it says that 21 U.S.C. § 853(n)(6) affirmatively limits the arguments that a third party can make in a proceeding such as this, and that our statutory argument is not among the permitted claims (U.S. Br. 11, 17-19). Second, the government asserts that, even if our argument were otherwise cognizable, Reckmeyer has already waived it irrevocably (U.S. Br. 16-17). Both theories are meritless.

1. This case began with a motion by defendant Reckmeyer to modify a restraining order against his assets so as to exclude therefrom, and from subsequent forfeiture, funds sufficient to pay his defense counsel (J.A. 43-48). At a hearing on that motion, the district court directed that, as a result of Reckmeyer's guilty plea, petitioner must instead seek payment of its fees by asserting a claim under 21 U.S.C. § 853(n) (J.A. 54-55).

The government in essence contends that the only arguments permissibly advanced by a third party in a Section 853(n)(2) proceeding are the two arguments that would produce a favorable judgment under Section 853(n)(6)—viz., that

Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may \* \* \* petition the court for a hearing to adjudicate the validity of his alleged interest in the property.

Section 853(n)(6) in turn provides that, if the third party establishes that his claim is superior to the government's, or that he was a good-faith purchaser without reason to know of the property's potential forfeitability, "the court shall amend the order of forfeiture" accordingly.

the third party has a superior claim or is a bona fide purchaser without notice. (U.S. Br. 17). In seeking to advance other statutory and constitutional contentions, the government says, we are improperly attempting "to assert rights of Reckmeyer's" rather than to recover "in [our] own right" (ibid.).

This argument is a recasting of the standing argument that the government advanced unsuccessfully in the district court (J.A. 77-78). The government repeated that contention, somewhat obscurely, in the court of appeals.<sup>2</sup> The *en banc* court rejected the government's argument on standing (see Pet. App. 7a-8a), and, perhaps as a result, the government raises the point only obliquely here (citing no authority for its position). In any event, our standing to assert injury from an assertedly erroneous statutory interpretation which has resulted in over \$195,000 in fees and expenses owed to us (including \$35,000 in fees actually paid to us) allegedly becoming the property of the federal government is clear, even if it was our client's rights that were initially violated by the restraining order here. Compare Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).<sup>3</sup>

Section 853(n)(2) provides in pertinent part as follows:

See U.S. Br. 47-50, United States v. Bassett et al., Nos. 86-5069, 86-5025, and 86-5050 (filed Aug. 7, 1986).

<sup>&</sup>lt;sup>1</sup> The government cites Section 853(k) as a bar to our statutory argument (U.S. Br. 17). But that subsection simply prevents a third party from intervening in or otherwise disrupting the criminal case. Section 853(k) does not purport to limit the arguments that a third party can advance in other proceedings (such as this) brought under Section 853(n)(2). Nor does subsection (n)(2) itself limit the universe of legal arguments that a third party can advance to support "the validity of his alleged interest in the [forfeited] property." Section 853(n)(6) does specify two arguments that will necessarily prevail, and we have conceded that we cannot advance those pariticular arguments successfully. But we contend that "the validity of [our] alleged interest in the [forfeited] property" is supported by other statutory arguments under Sections 853(c) and 853(e)(1)(A)-that funds needed to pay Reckmeyer's attorneys' fees should never have been restrained in the first place, nor should they have been included in any judgment of forfeiture entered against Reckmeyer. There is nothing in Section 853(n)(2), or elsewhere in Section 853, that prohibits us from advancing these contentions and, if they are correct, no apparent reason

2. The government's alternative, and more vigorously pressed, argument is that we are barred from advancing our statutory claim because Reckmeyer "pleaded guilty and as part of the plea agreement consented to the forfeiture of all the property identified in the indictment" (U.S. Br. 16). By agreeing to forfeiture of his assets, Reckmeyer assertedly "waived the claim" that we seek to advance (*ibid.*). Because principles of finality would now prevent Reckmeyer himself from retracting his waiver, the government concludes that we are "not entitled to prevail on the argument [that we are] making in this Court" (*id.* at 19).

The government invokes this "waiver" theory only against the "equitable discretion" line of argument that we derive from Judge Winter's concurring opinion in *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.), cert. granted, No. 88-454 (Nov. 7, 1988). But the government's "waiver" theory cannot logically be so confined. It would necessarily bar any statutory or constitutional argument that we might present, since the objective of any such argument would be to seek recovery from assets that Reckmeyer by his guilty plea "consented" to forfeit. The government did not advance this "waiver" theory in response to any of our arguments in either court below.

Assuming arguendo that the government's argument is properly presented, it is wrong, for it erroneously assumes that a stakeholder can waive the claim of a real party in interest. Had the district court's restraining order not been entered, or had it been modified pursuant to Reckmeyer's motion to permit him to pay reasonable attorney fees, the entire amount at issue would have belonged to us on May 17, 1985, the date on which Reckmeyer consented to forfeiture. It is obvious that, at the time Reckmeyer consented to the forfeiture of all "his" assets (including \$25,480 then in our possession), he was no longer a real party in interest

with respect to the sums at issue. Those funds would inevitably become the property of either the government or us; accordingly, Reckmeyer no longer had any economic stake in their disposition. Thus, the government's argument amounts to a contention that a stakeholder can waive the claim of one creditor and award the disputed sum to a competing creditor—a contention unsupported by reason, common sense or the cases the government cites.<sup>5</sup>

Acceptance of the government's "waiver" theory would produce an inequitable and anomalous result. If our statutory argument is correct, the government by hypothesis will have wrongly utilized the statute's restraining-order provisions to prejudice an innocent third party. It would be both unprecedented and unfair if the government could immunize that wrong from legal challenge by having Reckmeyer, who lacked any remaining economic interest in the disputed assets, waive our rights by consenting to forfeiture. The government's "waiver" theory would also create ethical problems in other cases if the Court were to decide in favor of our statutory argument in the pending Monsanto case. Any lawyer who had to advise his client about entering a guilty plea prior to a judicial determination exempting his fees from forfeiture, knowing that the plea would operate

why Congress would ever have chosen to prohibit their being raised by us.

<sup>&</sup>lt;sup>4</sup> As of May 17, 1985, Caplin & Drysdale was no longer representing Reckmeyer, as shown by the consent decree itself (J.A. 64).

<sup>5</sup> In the only opinion cited by the government (U.S. Br. 17) that is even arguably on point, United States v. Pemberton, 852 F.2d 1241 (9th Cir. 1988), it is unclear whether (i) the legality of the restraining order had ever been attacked; (ii) the defendant had other assets that could have been used to pay his lawyer; (iii) the attorney involved had agreed to the forfeiture stipulation; or (iv) the attorney had ever asserted a claim to the forfeited assets in his own name (as we did here prior to the forfeiture consent decree). In any event, if Pemberton can be read to hold that a defendant can waive his counsel's claim to assets that counsel would have received but for an invalid restraining order, Pemberton was wrongly decided. The other cases cited by the government (U.S. Br. 17 & n. 8) are off point. In United States v. Fischer, 833 F.2d 647 (7th Cir. 1987), no third party's rights were involved. In United States v. Alexander, No. 88-1324 (2d Cir., Feb. 21, 1989) (WESTLAW, CTA2 Database), there was no pretrial restraint of assets and, it appears, the attorneys never asserted a pre-conviction claim to the property. Indeed, the principal dispute was whether the government had agreed to permit payment of attorney fees out of the forfeited assets, an issue the court of appeals did not resolve.

as a waiver of the lawyer's own rights, would face a severe and unavoidable conflict of interest. In sum, this Court should not create a precedent that would enable stakeholders to destroy the property rights of real parties in interest.

# B. A District Court Has Discretion To Exempt From Forfeiture Assets An Indicted Defendant Needs For Ordinary Living Expenses And Reasonable Attorneys Fees

Apparently realizing the controlling force of the precedent from this Court cited by us for the proposition that a clear Congressional statement is required to divest federal courts of their normal equitable discretion in determining whether to grant injunctive relief (Pet. Br. 14-16), the government argues that the restraining order and forfeiture provisions of the 1984 Act, which on their face grant such discretion, must be read, in light of other provisions of the statute, as denying any judicial discretion to exempt assets to pay an indicted defendant's ordinary living expenses and attorneys fees prior to conviction.

The government first claims that the language of Section 853(a), which describes the various categories of property a convicted defendant "shall forfeit", controls the meaning of the word "may" in Section 853(c), which describes the consequences of a transfer of forfeitable assets to third parties. Having established to its satisfaction that no judicial discretion exists under Section 853(c) to exempt any third party not described in Section 853(n)(6) from the consequences of forfeiture of assets previously transferred by a defendant, the government then argues that the use of the term "may" in Section 853(e)(1)(A), in describing a court's power to restrain a defendant's assets, likewise imparts no discretion because such an exemption would limit the impact of the forfeiture mandated by Section 853(a).

The probable reason for the government's reversal of the chronological order of argument presented by us (and used by Judge Winter in his concurrence in *Monsanto*) is that it allows the government to downplay the problems presented by *pretrial* restraining orders by emphasizing the breadth

of post-conviction forfeiture penalties. This in turn enables the government to argue that orders dealing with interim relief, such as temporary restraining orders, should not control the ultimate outcome of a case. This approach would make sense in the ordinary case where restraining orders are simply used to preserve the status quo pending a final determination of the parties' rights. But it is wholly inappropriate in this case because the impact of the type of restraining order at issue here is not to preserve the status quo but rather to alter it dramatically by beggaring the defendant. Moreover, that alteration permanently deprives an indicted defendant of his ability to retain private defense counsel and materially lessens his ability to defend against the very charges on which the restraining order is based. Thus, the critical inquiry here, contrary to the government's view, must focus on the statutory scheme as it controls the respective rights of the government and the defendant prior to conviction.

1. The government's principal argument with respect to the post-indictment restraining order provisions of Section 853(e)(1)(A) is that a court cannot exempt assets from forfeiture so as to permit their expenditure on necessary living expenses and attorneys fees because the sole purpose of the provision is "to preserve" assets for forfeiture and, by definition, exempting assets from forfeiture defeats that purpose (U.S. Br. 27-28).6 This argument assumes that the

<sup>&</sup>quot;The government suggests that our interpretation of Section 853(e)(1)(A) will give rise to "anomalies" because there is no mechanism for excluding property from forfeiture in the absence of a government request for pretrial restraints (U.S. Br. 28 n.15). This argument is misplaced because it erroneously assumes that this Court will interpret Section 853(c) to deny lower courts discretion to exempt necessary living expenses and attorney fees from forfeiture (see infra at 10-14). If the Court permits such exemption, then lawyers and other providers of necessities will be confident that they will be able to retain amounts received from an indicted defendant, even without a court order, and the government will, as a result, not be "deterred" from seeking injunctive relief to bar the defendant from making other nonprotected transfers of assets. Furthermore, in appropriate circumstances, a defendant can seek declaratory relief from the trial court on this score. See, e.g., United States v. Bassett, 623 F. Supp. 1308 (D. Md. 1986).

purpose for granting a restraining order must control the reasons for denying one, a contention totally inconsistent with the standards normally governing equitable relief (Pet. Br. 15-16).

Although conceding that a court has discretion to grant or deny a restraining order under Section 853(e)(1)(A), the government adamantly insists that a hardship-based exemption for living expenses and attorneys fees "has no basis in equity practice" and is unauthorized by the statute (U.S. Br. 29-31). The government's assertion about "equity practice" is an ipse dixit unsupported by any authority and is flatly wrong. See Pet. Br. 20 n.9. Its statutory argument is based entirely on a negative implication drawn from Section 853(e)(1)(B) which expressly permits the court to take into account the "hardship" to the defendant when considering the issuance of a pre-indictment restraining order, while Section 853(e)(1)(A) has no comparable language with respect to post-indictment restraining orders. The government attempts to bolster its argument by citing legislative history to the effect that the "stringent standard" for pre-indictment restraints does not apply to post-indictment restraining orders (U.S. Br. 31).

As we have previously noted (Pet. Br. 17 n.6), the "stringent standard" of subsection (e)(1)(B) to which the government refers has two components, neither of which is rendered meaningless by Judge Winter's interpretation of subsection (e)(1)(A). The first is the need for the government to show a "substantial probability" that it will prevail on the forfeiture issue, a requirement that concededly is satisfied under subsection (e)(1)(A) by the indictment itself. The second component is the balancing of the need to preserve the property against the hardship to the party restrained. The balancing of hardship test in the pre-indictment stage is similar to but less restrictive than the traditional equity concept of "irreparable injury" applicable in the post-indictment context.

One can envisage many hardships, such as loss of access to funds to pursue advantageous business opportunities, which would properly be taken into consideration in the preindictment balancing test mandated by subsection (e)(1)(B), but which would not rise to the level of irreparable injury resulting from forced indigency which would be prohibited under Judge Winter's interpretation of subsection (e)(1)(A). In any event, the statutory reference to a balancing of hardships in the pre-indictment context cannot be read as a clear statement of Congressional intent to divest the federal courts of their normal equitable discretion when considering the issuance of restraining orders in the post-indictment context. See Pet. Br. 13-14.

In support of its position, the government consistently trivializes the defendant's interests at stake and exaggerates its own. Moreover, the government assiduously ignores the fact that restraining orders of the sort at issue here involve the de facto infliction of a criminal forfeiture penalty on an unconvicted defendant under the guise of preserving the status quo. For example, in discussing the injury inflicted by a restraining order, the government "doubt[s] that it imposes an unreasonable hardship on a defendant to prohibit him from enjoying the economic benefits of his criminal activities" (U.S. Br. 30). Such rhetoric is hardly an accurate depiction of the situation faced by a defendant who may (contrary to the government's premise) be innocent of the crimes charged but who is being deprived of his ability to pay for life's necessities and to retain a lawyer to defend him.

In contrast, in characterizing the governmental interest at stake, the government quotes Judge Mahoney, dissenting in *Monsanto*, for the proposition that "any transfer to a third party of property otherwise subject to a restraining order frustrates \* \* \* the expressly stated statutory purpose" (U.S. Br. 31-32). One is relegated to a footnote, however, to learn that the actual governmental interest at stake is that of maximizing revenue for the Department of Justice Assets Forfeiture Fund (id. at 32 n.16), which is the beneficiary of the difference between the defendant's payment of retained counsel at market rates and the government's

payment of appointed counsel at CJA rates for defending CCE and RICO forfeiture cases.

In sum, other than complaining that exempting the payment of necessary living expenses and attorneys fees from restraint pursuant to Section 853(e)(1)(A) is inconsistent with its view of the post-conviction reach of Section 853(c), discussed below, the government's arguments that federal courts lack discretion to limit the impact of a post-indictment restraining order by exempting necessary living expenses and attorneys fees are unsupported by the language of the statute and its legislative history. The government's position is also contrary to the canons of construction laid down by this Court for statutes dealing with injunctive relief. The government has altogether failed to address this authority, which is discussed in our opening brief (at 12-16).

2. We and the government do agree on one principle that should control the resolution of the statutory question in this case, namely, that a federal court should not have the discretion to exempt from a post-indictment restraining order property that the statute mandates shall ultimately be forfeited to the government upon the defendant's conviction. The disagreement between the parties is over the application of this principle. We contend that because necessary living expenses and attorneys fees must be exempt from pretrial restraint, they must also be exempt from post-conviction recapture from the payees by the government. The government contends that because payments made to third parties for goods or services, such as living expenses or attorneys fees, are not exempt from post-conviction forfeiture in the hands of the payees (except for bona fide purchasers under Section 853(n)(6)), such payments cannot be exempt from restraint prior to conviction.

As noted previously, the government initially bases its argument on Section 853(a), which mandates the forfeiture of various categories of property belonging to a person convicted of certain specified offenses (U.S. Br. 19-20). The fallacy of this argument is that Section 853(a) only addresses property belonging to a defendant at the time of his con-

viction. Here, Section 853(a)'s mandate has been satisfied—Reckmeyer has forfeited all his assets. Instead, the issue is whether assets claimed by us are forfeitable, a matter governed by Section 853(c).

Thus, the issue for this Court is the reach of Section 853(c), which governs forfeiture of assets transferred by a defendant prior to conviction, and its interplay with the restraining order provisions of Section 853(e)(1)(A). In the government's view, the only party having the right to retain forfeitable property transferred by a defendant prior to his conviction is someone who can demonstrate pursuant to Section 853(n)(6)(B) that he is a bona fide purchaser for value without reasonable cause to believe that the property was subject to forfeiture. Since we conceded below that we were unable to make such a showing, we must lose according to the government.

Section 853(c) expressly states that property forfeitable under Section 853(a) that is transferred to a third party "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) \* \* \* that he is a bona fide purchaser for value of such property \* \* \* " (emphasis added). Under the government's reading of the provision, the word "may" in the first clause means "shall". However, contrary to the government's position (U.S. Br. 21-22), the fact that subsection (n) is the only stated exception to the words "shall be ordered forfeited" in the second clause does not, as a matter of semantics or logic, indicate that the word "may" in the first clause means "shall". Indeed, the contrary interpretation that "may" connotes discretion is more natural,

With respect to the government's "conceptual difficulties" concerning a discretion that can only be exercised "one way" (U.S. Br. 20), a court asked to exempt payments to third parties for necessities under Section 853(c) will have to determine whether the payments were legitimate, whether the items or services purchased were in fact necessities and whether the prices paid were reasonable. Considerable discretion will be required in making those judgments.

particularly in light of the number of times the word "shall" is used in other subsections of Section 853.

The government attempts to explain away the use of the word "may" in Section 853(c) by contending that it is "simply language of authorization for the jury" (U.S. Br. 22). While creative, the government's argument nowhere explains why "shall" would not be an equally appropriate term of jury authorization. Compare Fed. R. Crim. P. 31(e) ("a special verdict shall be returned"). In any event, the language of Section 853(c) grants discretion to someone, and neither the statute nor its legislative history expressly states that such discretion is limited to the jury.

The fact that a different provision of the statute, Section 853(i)(1), gives the Attorney General the power to remit forfeiture after conviction by no means indicates, as the government urges (U.S. Br. 23), that a federal court lacks discretion under other sections of the same statute to exempt assets from forfeiture prior to or after conviction. Significantly, the government provides no authority for its novel statutory interpretation argument on this point. The government's further contention that a finding of judicial discretion here would constitute "sub silentio" Congressional authorization simply ignores our argument based on the express statutory language. The most that can be said about

Congressional intent as it relates to the use of the term "may" in Section 853(c) is that there is no legislative history that directly speaks to the point.

The government further attempts to negate the existence of judicial discretion under Section 853(c) by citing the Senate Report on the statute and several court of appeals cases for the proposition that forfeiture is "mandatory" (U.S. Br. 24-26). What the government neglects to point out is that both the legislative history and the cases it cites deal with the RICO and CCE provisions that govern forfeiture of property owned by the defendant following his conviction. Neither the Senate Report nor any of the cited cases deal with Section 853(c) or with the rights of the defendant to make property transfers prior to conviction for living expenses or attorneys fees. Since no issue is presented here concerning some asserted right on the part of Reckmeyer to avoid a post-conviction forfeiture of his own assets, the government's authority is simply irrelevant.

The government's subsequent ipse dixit that the "reasons for this mandatory rule are not diminished when the property has been transferred to a third party" (U.S. Br. 26) totally ignores the difference between mandating the imposition of a particular penalty upon the defendant after conviction and mandating the same penalty prior to conviction either by making it impossible for a defendant to use his assets or by penalizing legitimate transferees of those

<sup>&</sup>quot;The argument that allowing a federal court to exempt the use of defendant's assets to pay for living expenses and costs of defense prior to conviction would authorize the court "to give away" property of the United States (U.S. Br. 24) is a specious use of the relation-back fiction. The fact is that in reality the contested property does not become that of the United States until a forfeiture judgment is entered following conviction.

<sup>&</sup>quot;United States v. Von Neumann, 474 U.S. 242 (1985), cited by government (U.S. Br. 23), in which the issue was the timeliness of the Customs Service's action on a petition for remission from forfeiture, can at best be read to support the proposition that in other instances Congress has given the Executive Branch discretion to remit forfeitures. The relevance of Article II, § 2 of the Constitution is even more opaque since allowing a defendant limited access to his contested assets before conviction hardly constitutes a reprieve or pardon of the criminal offense with which he is charged.

<sup>18</sup> U.S.C. § 1963(a) (Supp. IV 1986); 21 U.S.C. § 853(a) (Supp. IV 1986). Thus United States v. L'Hoste, 609 F.2d 796, 809-13 (5th Cir.), cert. denied, 449 U.S. 833 (1980), and United States v. Godoy, 678 F.2d 84, 87-88 (9th Cir.), cert. denied, 464 U.S. 959 (1983), both cited in the Senate Report on the bill, S. Rep. 98-225, 98th Cong., 2d Sess. 191, 200 n.25 (1984), involved assets owned by the defendant at the time of his conviction as to which the issue was whether the district court had discretion to ignore the jury's forfeiture verdict. United States v. Hess, 691 F.2d 188, 190 (4th Cir. 1982); United States v. Kravitz, 738 F.2d 102, 10406 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Busher, 817 F.2d 1409, 1414 (9th Cir. 1987); and United States v. Perholtz, 842 F.2d 343, 369 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988), are all to the same effect.

assets on the ground they were aware of the government's charges against the defendant.

Contrary to the government's repeated assertions of Congressional intent to achieve the result it seeks here, the legislative history of the 1984 Act is utterly devoid of any indication that Congress made a considered judgment that maximization of the revenues flowing into the Department of Justice Assets Forfeiture Fund justifies empowering the government to compel the federal courts, by indictment alone, to beggar defendants prior to conviction and to deprive them of the means to employ private counsel to defend them. While we submit that the 1984 Act's literal language empowers federal courts to exempt from pretrial restraint and post-conviction forfeiture sufficient assets for a defendant to live and defend himself, at best the government's counter-arguments demonstrate statutory ambiguity and lack of Congressional focus on the issue. Under these circumstances, Judge Winter's invocation in Monsanto of this Court's rule that "statutes capable of differing interpretations should be construed to avoid constitutional issues", 852 F.2d at 1409, should also be applied by this Court.

II. THE SIXTH AMENDMENT BARS CONGRESS FROM EL-EVATING THE GOVERNMENT'S FINANCIAL INTER-EST IN MAXIMIZING THE PROCEEDS OF FORFEITURE OVER A DEFENDANT'S RIGHT TO USE HIS ASSETS PRIOR TO CONVICTION TO PAY FOR RETAINED COUNSEL

In the preface to its discussion of the constitutional issues, the government mischaracterizes the context in which this Court is called upon to decide those questions in two materially important respects. First, it urges that substantial deference is due to the "carefully considered decision" of Congress in its enactment of the 1984 Act (U.S. Br. 33). Whatever else may be said about the legislative history of the 1984 Act, it is quite clear that Congress devoted no consideration at all either to identifying or resolving the issues presented by (i) pretrial restraints on a defendant's assets which would prevent the retention of private counsel or (ii) post-conviction forfeiture of assets previously paid as

legitimate attorneys fees. Indeed, as we have previously argued, the absence of such careful consideration by Congress is itself a basis for this Court to interpret the statute to avoid constitutional problems (Pet. Br. 33-34).

Second, the government, following the Fourth Circuit majority below, seeks to raise the spectre of "the grave national problem of narcotics trafficking" (U.S. Br. 33) as a reason to uphold the constitutionality of interpreting the statute to permit the government to deprive accused drug dealers of any ability to retain private defense counsel. However, the forfeiture provisions at issue in this CCE case are identical to those contained in the RICO statute. 18 U.S.C. § 1963(a)(m) (Supp. IV 1986), and thus apply to a veritable panoply of white collar economic crimes.11 Moreover, there is no limiting principle that would bar application of the forfeiture laws to any crime from which the accused derived economic benefit, such as tax evasion (see Pet. Br. 45). Thus the constitutional rights at stake here are those of all persons whom the Congress has determined, or may in the future decide, should be punished by, inter alia, being compelled to forfeit their "tainted" assets12 pursuant to a statutory scheme such as that established in Section 853.

 Initially, the government makes a half-hearted attempt to suggest that we lack standing to raise the constitutional

<sup>&</sup>quot;See 18 U.S.C. § 1961(a)(1) (Supp. IV 1986), which defines "racketeering activity" to include, inter alia, bribery, sports bribery, gambling, counterfeiting, embezzlement from pension and welfare funds, mail fraud, wire fraud, sales of obscene materials, money laundering, interstate transportation of stolen property, trafficking in contraband cigarettes, securities fraud and violations of the currency and foreign transaction reporting statute.

<sup>&</sup>lt;sup>12</sup> Such assets are not, as the government sometimes suggests, limited to "proceeds" of crime or assets that were "illegally derived" (U.S. Br. 33). They include assets obtained wholly legitimately if such assets are part of the defendant's interest in any enterprise that he has "established, operated, controlled, conducted or participated in the conduct of, in violation of [18 U.S.C.] section 1962." 18 U.S.C. § 1963(a)(2) (Supp. IV 1986). See, e.g., United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987). See also 21 U.S.C. § 853(a)(3) (Supp. IV 1986).

issues in this case (U.S. Br. 35). To the extent this contention repeats the government's threshold argument, we have already addressed the point at pages 2-6, supra. If the government is suggesting that we lack jus tertii standing to raise Reckmeyer's Sixth Amendment rights, not only has the argument been rejected by every court that has considered it (see, e.g., Pet. App. 8a), but the concept of derivative standing in situations such as this is well established. See, e.g., Craig v. Boren, 429 U.S. 190, 196 (1976); Singleton v. Wulff, 428 U.S. 106, 114-15 (1976).

2. The government attacks our Sixth Amendment claim by asserting that the Sixth Amendment is procedural not substantive, and hence that it could not compel a remedy that would "require[ ] the court to dismiss a portion of the underlying indictment" (U.S. Br. 38-39). Given that the statute makes clear that forfeiture is a criminal penalty which is imposed on a convicted defendant at the time of sentencing, Section 853(a), it is difficult to take this argument seriously. The fact that forfeiture allegations are in an indictment no more makes them an element of the criminal offense charged than would a recitation in the indictment of the sentence requested by the government.13 The notion that authorizing use of assets described in the forfeiture count of an indictment to pay attorneys fees would somehow acquit a CCE defendant, such as Reckmeyer, of a violation of 21 U.S.C. § 848 can only be characterized as specious.

The government next argues that the Sixth Amendment does not apply because the statute does not provide for the forfeiture of attorneys fees "as such" nor does it "arbitrarily single out attorneys or their fees for adverse treatment" (U.S. Br. 39). Putting aside the fact that attorneys will be uniquely unable to satisfy the reasonably-without-cause-to-

believe requirement of Section 853(n)(6)(B), as compared with the house sellers, travel agents, car dealers, grocers, or accountants adverted to by the government, the fact that attorneys and their fees are not singled out for special mention in the forfeiture provisions proves nothing beyond an absence of Congressional intent to deprive a defendant of his ability to retain counsel.

As did the Fourth Circuit majority below, the government seeks to disclaim responsibility for a defendant's inability to retain private counsel when faced with either a restraining order covering all his assets or the threat of post-conviction fee forfeiture in the absence of pretrial restraint (U.S. Br. 40). Instead, the government blames the defendant's plight on his own conduct or on that of the Nation's attorneys who, lacking assurance of payment, decline to defend a CCE or RICO defendant faced with possible forfeiture of all his assets.

Contrary to the government's view, the defendant's impecuniousness is the direct result of governmental action. As the government implicitly acknowledges, the "various legal or practical circumstances" that render a defendant unable to employ counsel (U.S. Br. 38) result from the prosecutor's allegations of the defendant's criminal conduct and of the nature and extent of the defendant's forfeitable assets. Furthermore, the statutory scheme that permits, if this Court so holds, pretrial restraint of all an accused defendant's assets is invoked upon the request of the executive branch of the government, was enacted by the legislative branch of the government, and will be implemented by the judicial branch. In short, none of a CCE or RICO defendant's inability to employ counsel when faced with blanket forfeiture allegations is attributable either to the laws of economics or nature.14

<sup>&</sup>lt;sup>13</sup> Indeed, the Second Circuit in *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980), has held that forfeiture allegations in an indictment need not specifically describe the property for which forfeiture is sought and that the grand jury need not consider whether particular property is forfeitable in rendering the indictment. This holding was based on the fact that statutory forfeiture is simply a criminal penalty. 633 F.2d at 1024-25.

<sup>&</sup>quot;The government also contends that the ethical problems to which we refer (Pet. Br. 35-37) are "speculative" and seeks to minimize their significance (U.S. Br. 40 n.21). As to the possibility of a lawyer's seeking to remain in ignorance of his client's financial affairs so as to qualify as a bona fide purchaser under Section 853(n)(6)(B), it is not clear that an

Similarly, the government's attempt to take this case out of the Sixth Amendment arena by converting it into a property dispute in which the defendant's inability to employ counsel is simply a function of his prospective attorney's notice of the government's claim to superior title (U.S. Br. 41-42) is an effort to exalt form over substance. As we have previously noted (Pet. Br. 40-41), assets that are subject to a forfeiture indictment under Section 853 do not become the property of the government unless and until the defendant is convicted and a special verdict of forfeiture is

indictment will provide the requisite notice, particularly where the indictment describes forfeitable property in generic terms. See, e.g., United States v. Grammatikos, supra, note 13. Moreover, our concession that no defense counsel could satisfy the statutory standard was limited to ethical defense lawyers.

The government's finessing of the potential conflict of interest in the guilty plea context by arguing that Reckmeyer was not subject to such a conflict is both unresponsive to our point that such conflicts will be created by the statute in most cases, if the government's position prevails, and is particularly ironic given the government's previous argument that Reckmeyer's guilty plea and consent to forfeiture waive our rights to be paid our fees. Obviously, in the government's view, we should have persuaded Reckmeyer not to plead guilty until after the district court had ruled (as it subsequently did) in favor of releasing assets to pay our fees. Since such a delay might have resulted in the government withdrawing its proposed plea bargain, a clearer conflict of interest between Reckmeyer and us would be hard to imagine. The fact that this Court was willing to tolerate conflicts of interest on the part of attorneys handling civil rights cases, Evans v. Jeff D., 475 U.S. 717 (1986), where the Sixth Amendment does not apply, hardly stands for the proposition that such conflicts are tolerable in criminal cases. Compare, Wheat v. United States, 108 S. Ct. 1692 (1988).

As to the government's suggestion that contingent fees in criminal cases raise no constitutional issues and that Congress could prefer such a regime to allowing attorneys to accept "drug money" as fiees, the facts are (i) the vast bulk of lawyers simply will not take criminal cases involving forfeiture allegations absent assurance of payment because most such cases are lost either by plea or trial and the fees chargeable in the cases won will not offset the losses, (ii) there is no evidence that Congress ever considered the contingent fee problem when enacting the statute much less reached a "conclusion" about it, and (iii) the funds that defendants would be prohibited from paying their counsel are not limited to drug money but include many assets merely associated with the commission of the crime. See notes 11 and 12, supra.

entered. The relation-back fiction of Section 853(c) is a legitimate mechanism for preventing fraudulent conveyances of a defendant's assets prior to conviction. The question for this Court is whether it is also legitimate, in the context of the Sixth Amendment, for the government to use the relation-back fiction, coupled with pretrial restraining orders, to maximize the revenue effect of the criminal forfeiture penalty by depriving unconvicted defendants of their ability to employ any privately retained counsel for their defense.<sup>15</sup>

With respect to this issue, the government's brief is noteworthy for what it does not say as much as for what it does. For example, the government makes no attempt to refute the point that the effect of its interpretation of the CCE and RICO forfeiture provisions will be to impose a criminal penalty on defendants prior to conviction because, guilty or innocent, they will never be able to utilize private counsel in their defense. Similarly, the government makes no real effort to balance the public benefit of banning defendants from using their contested assets to defend themselves against the resulting injury to the defendants. Presumably the reason for this failure is the government's recognition that increasing the revenue flowing into the Department of Justice Assets Forfeiture Fund (U.S. Br. 32) n.16) does not weigh heavily against a defendant's interest in employing his counsel of choice.

<sup>15</sup> The government's bank robbery analogy (U.S. Br. 43) is grossly misleading since it totally ignores the fact that the forfeiture provisions at issue here are penalties, like fines, not reclamation of property stolen from someone. While we agree that a defendant could not claim a Sixth Amendment right to utilize contraband or other property which cannot legally be possessed by anyone to pay his lawyer, that concession does not logically lead to the conclusion that money, which is fungible and, by hypothesis, has not yet been shown to have been illegally obtained, much less forfeitable, should be treated similarly. Despite the government's invocation of Stowell v. United States, 113 U.S. 1 (1890), to show the historical longevity of the "taint" theory of forfeiture, the fact remains that, as Judge Phillips stated in the original panel opinion in this case. the Sixth Amendment was drafted "on the assumption-indeed with the sure knowledge-that in exercising the primary right to privately retained counsel, ill-gotten gains might be used by defendants who would ultimately be found guilty" (Pet. App. 66a).

While the government has emphasized that a defendant will always be entitled to counsel appointed under the Criminal Justice Act and that such counsel must provide "reasonably competent assistance" (U.S. Br. 34), it does not have the temerity to contend that accused persons will be able to obtain under the CJA the quality of criminal defense available in this country from the private criminal defense bar. Granting the government the power, through forfeiture indictments and restraining orders, to prevent a defendant from employing any lawyer from the entire private defense bar will sanction an unprecedented governmental denial of the Sixth Amendment right to counsel of choice based solely on the government's financial interests. Such a wholesale shift in the working of our adversary system based on such skimpy governmental interests should not be countenanced by this Court.

#### CONCLUSION

The decision of the Fourth Circuit *en banc* should be reversed, and the case should be remanded with instructions to reinstate the judgment of the district court in favor of petitioner.

Respectfully submitted,

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Nos. 87-1729 and 88-454

Supreme Court, U.S. FILED

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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE,

V.

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner.

v.

PETER MONSANTO,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Second Circuits

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

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ABA, Reports with Recommendations to the House of Delegates, Report No. 108A (July, 1985) Comprehensive Drug Penalty Act, H.R. 4901
Concerning Forfeiture of Attorneys' Fees: Hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986) (statement of Federal Public Defender Edward Marek, on
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Forfeiture Issues: Hearing Before House of Rep-
representatives, Subcommittee on Crime, Committee on the Judiciary, 99th Cong., 1st Sess.
178 (1985)
Field Hearing on Federal Drug Forfeiture Activ-
ity: Hearing Before House of Representatives,
Subcommittee on Crime, Committee on Judi-
ciary, 100th Cong., 2d Sess. 177 (1988)
H.R. Rep. No. 845, part 1, 98th Cong., 2d Sess. 19
(1984)
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ABA Model Code of Professional Responsibility
DR 5-101(A)
ABA Model Code of Professional Responsibility
DR 5-102
ABA Model Rules of Professional Conduct, Rule
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ABA Model Rules of Professional Conduct, Rule
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# Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1729 and 88-454

CAPLIN & DRYSDALE,

v.

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

PETER MONSANTO,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Second Circuits

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

### INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 347,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges, legislators, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields. From its inception more than 100 years ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel in our adversary system of criminal justice. Because the right to counsel and the preservation of an adversarial system of criminal justice are matters central to the administration of justice, the ABA seeks to appear as amicus curiae.

These cases raise the fundamental question of whether fees paid to a defense attorney rendering legitimate services in a criminal case should be subject to criminal forfeiture. The ABA recognizes that the government has a legitimate interest in the forfeiture of assets obtained through criminal activity. Nevertheless, the ABA opposes pre-trial restraints on the payment of bona fide atorneys' fees or the post-trial forfeiture of bona fide attorneys' fees absent reasonable grounds to believe that the fee payments are a mere sham or fraudulent transfer to protect a defendant's assets from forfeiture.

After Congress enacted the Comprehensive Forfeiture Act of 1984 (the "CFA"), the ABA carefully examined the impact of the enhanced forfeiture laws on our criminal justice system. Based on a report submitted by the Criminal Justice Section on July 9, 1985, the ABA House of Delegates adopted a resolution stating:

That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect the illegal activity of a client.

ABA, Reports with Recommendations to the House of Delegates, Report No. 108A (July, 1985).

In August of 1986, the ABA adopted a further resolution, again accompanied by a Criminal Justice Section Report, stating:

That the American Bar Association disapproves of the use of statutory forfeiture provisions in pretrial and other orders to prevent a defendant from paying counsel of choice or paying other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe that these payments constitute a sham, fraud, or criminal conduct.

ABA, Reports with Recommendations to the House of Delegates, Report No. 136A (August, 1986).

In furtherance of these declared policies, the ABA appears in these cases to voice its opposition to fee forfeiture and to underscore the deleterious impact that forfeiture of bona fide attorneys' fees will have on our system of criminal justice.

### SUMMARY OF ARGUMENT

Application of the forfeiture provisions of the CFA to legitimately earned attorneys' fees would bring about a fundamental restructuring of our adversary system of criminal justice and threaten core constitutional values which lie at the heart of the guarantee to a fair trial. The fee forfeiture provisions potentially apply to 25% of the criminal cases brought in federal court, including all drug, obscenity and money-laundering offenses. Yet, the sweeping consequences spawned by application of the forfeiture provisions in this context would be the unintended result of a statute clearly aimed elsewhere.

The relation-back doctrine at issue in this case was intended only to prevent sham transactions in anticipation of forfeiture. Ironically, legitimate attorneys' fees are swept into the statutory scheme only because of the special nature of the attorney-client relationship. Unlike any other legitimate provider of pre-conviction services

to the defendant, the criminal defense attorney is required to seek out information on the charges against his client. Yet, acquiring the information necessary to conduct a competent defense is precisely what makes the attorney vulnerable to fee forfeiture, because the lawyer is almost by definition on notice that the client's property may be subject to forfeiture. The privileged, confidential relationship between attorney and client, which is so central to due process protections for the criminally accused, is therefore seriously undermined by the threat of fee forfeiture.

Nothing in the legislative history of the CFA remotely suggests that Congress intended this result. Basic principles of statutory construction dictate that the statute should be construed to avoid the grave constitutional difficulties that forfeiture of legitimately earned attorneys' fees would cause.

Moreover, even if Congress had explicitly included legitimate attorneys' fees within the CFA, the Constitution would prohibit this gross governmental interference with the rights of the accused. The Sixth and Fifth Amendments independently mandate that the CFA be held unconstitutional as applied to legitimately earned attorneys' fees. The forfeiture of assets necessary to pay such fees violates the Sixth Amendment by interfering with the defendant's right to counsel of choice. Pretrial restraints on the payment of bona fide attorneys' fees, as a practical manner, will prevent the defendant from using his assets to hire counsel of choice even before his guilt or innocence has been adjudicated or any verdict of forfeiture concerning those assets has been rendered. The specter of forfeiture not only could deter counsel from undertaking a representation in the first instance but could force existing counsel to withdraw. Besides the risk of non-payment, defense counsel would confront ethical rules against accepting representation in which payment is contingent upon the outcome of trial. The government can demonstrate no countervailing interest sufficiently compelling to justify this substantial infringement on the defendant's constitutional right to choose counsel.

Moreover, fee forfeiture creates a disincentive for defense counsel to learn information about his client's activities because this might imperil counsel's ability to make the required statutory showing that he had no knowledge that the client's assets were forfeitable. The conflict thus created between the lawyer's duty to prepare the case as thoroughly as possible and his efforts to retain his fee will undermine the defendant's unqualified right to effective assistance of counsel. On a more general level, the practice of fee forfeiture will deter counsel from accepting representation in complex criminal cases and thus may inhibit the education and development of qualified defense attorneys, a prospect of institutional concern to the ABA.

In addition, fee forfeiture violates the Fifth Amendment guarantee of due process in that it affords the government unparalleled control over a defendant's ability to defend himself prior to an adjudication of guilt. thus compromising the right to a fair trial that is the cornerstone of our criminal justice system. Prior restraints on bona fide attorneys' fees allow the government to force withdrawal of retained counsel at a time of its choosing, merely by making unproved allegations of forfeiture in the indictment or by seeking pre-trial restraint of assets. Thus, fee forfeiture will vest the government with a powerful new weapon-significant control over the resources of the defendant, his selection of counsel, and the means by which an accused presents his criminal defense. This unprecedented intrusion into the attorney-client relationship is incompatible with our adversary system of criminal justice.

For all of these reasons, the ABA believes that pretrial restraints on fees and the threat of possible forfeiture after trial infringe upon a defendant's Sixth and Fifth Amendment rights. In light of these serious constitutional problems, and in the absence of an unequivocal expression of Congressional intent to authorize fee forfeiture, the ABA urges this Court to construe the CFA narrowly so as not to encompass the forfeiture of bona fide attorneys' fees.

#### ARGUMENT

I. THE CFA DOES NOT AUTHORIZE THE FORFEI-TURE OF BONA FIDE ATTORNEYS' FEES PAID TO DEFEND THE ACCUSED IN A CRIMINAL CASE.

It must be acknowledged at the outset that the forfeiture provisions of the CFA, on their face, broadly cover all property derived from alleged criminal activity and contain no specific exemption for property used to pay bona fide attorneys' fees. Yet this Court has ample discretion to construe the statute to avoid results that are both constitutionally unsound and unintended by Congress. Criminal defense attorneys are the only providers of legitimate pre-conviction services whose relationship with the accused is constitutionally protected. At the same time, and precisely because of that constitutionally protected relationship, they are also the only providers of legitimate pre-conviction services whose fees would be routinely subject to forfeiture. Nothing in the legislative history or the statute itself suggests that Congress intended this anomalous result. Moreover, fundamental principles of statutory construction require that the statute be construed to avoid the profound constitutional difficulties that forfeiture of legitimately earned attorneys' fees would cause.

The Comprehensive Forfeiture Act of 1984,1 was enacted to correct specific deficiencies in existing crim-

inal forfeiture law. The "relation back" doctrine, on which the government relies here, was specifically intended to prevent fraudulent pre-conviction transfers to avoid forfeiture. In order to further the punitive purpose of depriving convicted criminals of the fruits of their crimes, see United States v. Unit No. 7 and Unit No. 8, 853 F.2d 1445, 1451 (8th Cir. 1988); United States v. Lizza Industries, 775 F.2d 492, 498 (2d Cir. 1985), the statute provides that "All right title and interest in property . . . [subject to forfeiture] vests in the United States upon commission of the act giving rise to forfeiture." 18 U.S.C. § 1963(c); 21 U.S.C. § 853 (c). The intent was to reach preconviction transfers "to third parties acting as nominees or who have knowingly engaged in sham or fraudulent transactions." S. Rep. No. 225, 98th Cong., 2d Sess. 200, 209 n.47 (1984). These transactions do not include "arms length transactions" by the defendant with third parties. Id. at 201.

The relation-back doctrine therefore has no effect on most legitimate pre-conviction transfers, because the rights of bona fide purchasers for value—that is, anyone who received payment for goods or services from the accused without knowledge or "cause to believe" that the property would be subject to forfeiture—are specifically protected.<sup>2</sup> If applied to bona fide legal fees, that standard would either be a nullity that could never be satisfied or it would fundamentally and improperly undermine the attorney-client relationship. The criminal defense attorney is in a unique position because the very nature of

<sup>&</sup>lt;sup>1</sup> The Comprehensive Forfeiture Act was enacted as Chapter III of the Comprehensive Crime Control Act of 1984, P.L. No. 98-473, §§ 301-322, 98 Stat. 1837 (1984).

<sup>&</sup>lt;sup>2</sup> Under the CFA, a court is authorized to grant post-trial relief from a forfeiture order to those who received assets from the defendant who either had a superior claim of title at the time of the criminal offense or who is "a bona fide purchaser for value of the right, title, or interest in the property [who] was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 18 U.S.C. § 1963(l)(6)(B); 21 U.S.C. § 853(n)(6)(B).

his services will often, and perhaps inevitably, entail knowledge of the possibility of forfeiture.

Unlike other persons who may do business with the accused, the defense attorney has a professional obligation to learn as much as possible about the actual and potential allegations against his client, including allegations that may ultimately lead to forfeiture. A threatened charge and an actual indictment would certainly provide some "notice" of potential forfeiture, but it is in those circumstances that an accused is most intensely in need of counsel of his own choosing in whom he may confide without reservation. Indeed it is a fundamental precept of our adversary system that full disclosure and complete confidence between attorney and client are essential to adequate representation. Thus, counsel's efforts to investigate the charges against his client will almost inevitably lead him to have some knowledge of the basis of the government's forfeiture allegations. Much of this information may be obtained through privileged communications; the rest may be attorney work product. The CFA and its legislative history disclose no legislative intent to discourage lawyers from representing persons suspected or accused of covered crimes, or to interfere with counsel's duty to become thoroughly familiar with the facts surrounding the government's case.

The absence of specific legislative guidance on the restraint or forfeiture of attorney's fees is persuasive evidence that Congress did not intend to precipitate dramatic changes in the adversary system or a defendant's right to counsel. The sole passage addressing the restraint and forfeiture of attorneys' fees is found in a House Report on a separate unenacted forfeiture bill. See H.R. Rep. No. 845, part 1, 98th Cong., 2d Sess. 19 n.1 (1984) (Report on Comprehensive Drug Penalty Act of 1984). The extent of the legislative discussion on this

question is limited to the statement that: "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." No historical evidence exists to suggest that Congress intended the CFA to effect a dramatic shift in the traditional balance of power between adversaries in our criminal justice system.

Of course, if the government demonstrates that counsel engaged in a fraudulent or sham transaction to evade forfeiture, a different result would obtain. Congress intended to reach 'third parties . . . who have knowingly engaged in sham or fraudulent transactions." S. Rep. No. 225, at 209 n.47. Here the government has not challenged the bona fide character of the disputed attorneys' fees and this question, thus, is not at issue.

A construction of the statute excluding bona fide attorneys' fees also is necessary to avoid a multitude of serious constitutional infirmities. A cardinal principle of statutory construction requires that courts "first ascertain whether a construction of the statute is fairly

<sup>&</sup>lt;sup>3</sup> The Comprehensive Drug Penalty Act, H.R. 4901, was passed by the House in 1984 and referred to the Senate. Although this bill

was not acted upon by the Senate, many of its provisions were similar to the subsequently enacted Chapter III of the Comprehensive Crime Control Act.

<sup>&</sup>lt;sup>4</sup> H.R. Rep. No. 845, part 1, at 19 n.1. The House Judiciary Committee therefore declined to resolve the prior conflict in district court opinions on the use of restraints impinging on counsel fees. *Id.* 

<sup>&</sup>lt;sup>5</sup> In addition, the 1984 Act provides other sanctions that a court might invoke where there is reason to believe that an attorney is assisting the defendant in a sham or fraudulent transfer of his assets. The "alternative fine" provided by Congress in 1984, see 18 U.S.C. 1963(a); 21 U.S.C. § 853(a), permits the court to impose a fine of up to twice the defendant's criminal profits, thus enabling the court to deal severely with any attempt by the defendant to shield his assets through an improper use of the attorney-client relationship. Similarly, if defense counsel particiaptes in such a scheme to assist the defendant in defrauding the government, the government will have recourse against defendant and defense counsel alike.

possible by which [a constitutional] question may be avoided." <sup>6</sup> Crowell v. Benson, 285 U.S. 22, 62 (1932). Moreover, as this Court has held, if the construction of the plain language of a statute presents a significant risk that constitutional rights will be infringed, such a construction must be supported by a "clear expression of an affirmative intention of Congress." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979). In the absence of such unequivocal Congressional intent, this Court has not hesitated to construe statutes in a manner that would avoid reaching difficult constitutional issues. Id. at 507.

As succeeding sections of this brief explore, the use of the forfeiture provisions to reach bona fide legal fees would raise constitutional questions of sufficient magnitude as to invoke these principles. Fee forfeiture and pre-trial restraints on fees implicate serious questions under the Fifth and Sixth Amendments. And neither the CFA itself, nor its legislative history, contains any clear expression of a Congressional intent to bring bona fide attorneys' fees within the reach of the criminal forfeiture laws. Indeed, Congressmen intimately involved with the passage of the CFA have confirmed that they never considered, much less intended, such a result. See Forfeiture Issues: Hearing Before House of Representativs Subcommittee on Crime, Committee on the Judiciary, 99th Cong., 1st Sess. 178 (1985) (statement of Rep. Shaw); Field Hearing on Federal Drug Forfeiture Activity: Hearing Before House of Representatives, Subcommittee on Crime, Committee on the Judiciary, 100th Cong., 2d Sess. 177, 181 (1988) (statements of Rep. Shaw and Chairman Hughes).

The troubling constitutional issues raised by fee forfeiture have convinced many, although not all, courts that have construed the CFA to interpret the Act narrowly so as to exempt bona fide attorneys' fees. 5 See, e.g., United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1986); United States v. Rogers, 602 F. Supp. 1332 (D. Colo 1985). See also United States v. Monsanto, 852 F.2d 1400, 1405 (2d Cir. 1988) (en banc) (Winter, J., concurring). Contra United States v. Nichols, 841 F.2d 1485, 1493-96 (10th Cir. 1988); United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988). The ABA supports the well reasoned conclusions of these courts that the forfeiture laws do not apply to fees paid or payable to defense counsel fulfilling their legitimate and constitutionally prescribed role of providing an effective defense and do not justify pretrial seizures of assets that are reasonably necessary to pay bona fide fees to counsel.

<sup>- &</sup>lt;sup>6</sup> An equally fundamental principle instructs that ambiguous criminal statutes must be narrowly construed. *McNally v. United States*, 107 S. Ct. 2875, 97 L.Ed.2d 292, 302 (1987); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The rule of lenity has been applied to the criminal forfeiture laws. *See*, e.g., *United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987).

<sup>&</sup>lt;sup>7</sup> In a concurring opinion in *United States v. Monsanto*, Judge Winter, joined by two other judges, construed the statute narrowly, but without addressing these constitutional difficulties. Judge Winter concluded that the CFA vests discretion with the court to restrain assets identified in an indictment as subject to forfeiture, including counsel fees, and that this discretion is to be guided by traditional equitable principles. In reaching this conclusion, Judge Winter focused on the "permissive" nature of the statutory language which states that a court "may" enter a restraining order. After balancing the relative hardships to the parties, Judge Winter concluded that the government's nominal property rights in potentially forfeitable assets do not outweigh the hardship imposed on a defendant who is prevented from retaining private counsel of choice. For substantially the same reasons, he further concluded that once a district court finds that counsel fees are exempt from pre-trial restraint, those assets are exempt from subsequent postconviction forfeiture.

# II. IF THE CFA PERMITS FEE RESTRAINTS AND FEE FORFEITURE, IT VIOLATES THE ACCUSED'S RIGHT TO COUNSEL.

Fee forfeiture threatens core constitutional issues of profound significance to our adversary system of criminal justice. The potential impact of these constitutional infirmities is far-reaching; Congress has authorized criminal forfeiture as a sanction for an estimated 25% of the criminal cases brought in federal courts, *United States v. Nichols*, 841 F.2d at 1488, and the list of offenses for which forfeiture is a sanction has steadily increased. Accordingly, the ABA urges that, if the Court finds that fee forfeiture is authorized by statute, the Court should hold that fee restraints and fee forfeiture infringe on rights secured by the Sixth Amendment.

# A. Fee Forfeiture Violates a Defendant's Sixth Amendment Right to Counsel of Choice.

The Sixth Amendment guarantees that a criminal defendant with the resources to retain counsel has the right to choose his or her own counsel. Wheat v. United States, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988); Powell v. Alabama, 287 U.S. 45, 53 (1932). Courts are reluctant to dishonor the defendant's choice of counsel because "[e]mbodied within the Sixth Amendment is the

conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount." United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (citing Faretta v. California, 422 U.S. 806 (1975), and Brooks v. Tennessee, 406 U.S. 605 (1972)). See also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934). "It is from this principle and belief that the defendants' right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Laura, 607 F.2d at 56.

Admittedly, the right to counsel of choice is a qualified right. It is conditioned, initially, on the accused having sufficient assets to hire the lawyer of his choice. For example, when an impecunious defendant desires to have the court appoint a particularly celebrated defense counsel, the court is not obliged to enforce that preference. That, of course, is a far cry from allowing a court, at the instance of the prosecution, to strip the accused of assets so that he cannot retain the otherwise available counsel of his choice.

Moreover, the right to counsel of choice, where sufficient assets to pay the attorney are available, may be overcome in limited circumstances when the orderly administration of justice so requires. As almost every court that has considered the issue has recognized, the government may have other legitimate countervailing interests-such as an interest in acquiring all property allegedly traceable to illegal activity—but those interests must be weighed against the defendant's right to select counsel. See United States v. Unit No. 7 and Unit No. 8, 853 F.2d at 1450-51; United States v. Nichols, 841 F.2d at 1502. See also United States v. Monsanto, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc) (Feinberg, J. with Oakes & Kearse, JJ. concurring). The majority of the Fourth Circuit en banc in Caplin & Drysdale, however, never undertook to apply the required Sixth

<sup>\*</sup> In 1984, for example, Congress expanded the class of offenses for which forfeiture is possible to include all drug offenses, obscenity offenses, and violations of the Currency and Foreign Transactions Reporting Act. See 18 U.S.C. § 1961(1). In 1986, Congress created broad new money-laundering offenses, codified at 18 U.S.C. §§ 1956, 1957, for which forfeiture is a possible sanction. See 18 U.S.C. § 1961(1). In 1988, Congress enacted legislation adding additional offenses, such as credit card fraud, 18 U.S.C. § 1029, and copyright infringement, 18 U.S.C. § 2319, to this expanding list of offenses for which forfeiture is a possible sanction.

Amendment balancing test because it incorrectly concluded that a defendant has no ownership interest in allegedly forfeitable assets and the qualified right to counsel "does not apply at all in the fee forfeiture context." United States v. Caplin & Drysdale, 837 F.2d 637, 644 (4th Cir. 1988) (en banc).

In so holding, the court apparently relied on the "relation back provision" of the CFA, which, upon conviction, vests title to the defendant's forfeitable assets in the government, as of the date the assets were illegally acquired or used. The court thus viewed the government's mere allegations of forfeiture in the indictment, in conjunction with the relation back doctrine, as sufficient to divest the defendant of any property interest in the contested assets. In sum, the court concluded, the defendant against whom an unproved claim of forfeiture has been made "does not have the legal assets that entitle him to a right to counsel of choice in the first place." Id.

The ABA submits that this analysis simply fails to take account of the presumption of innocence. By asserting that the relation back doctrine bars a defendant's use of allegedly forfeitable property to pay his attorney, the Fourth Circuit in essence concluded that these assets are indeed forfeitable. This conclusion strikes at the very core of our adversary system under which the defendant is presumed innocent and his assets are thus presumptively legitimate. The relation back doctrine, which is triggered only upon conviction, United States v. Nichols, 841 F.2d at 1498; United States v. Thier, 801 F.2d 1463, 1476 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987), does not purport to eliminate the presumption of innocence prior to trial nor does it authorize the imposition of punitive sanctions prior to a conviction. Thus, until the defendant has been convicted, the government must offer some justification sufficiently

compelling to override the defendant's right to utilize his presumptively legal assets in his own defense.9

When the proper Sixth Amendment balancing test is applied, a defendant's interest in choosing counsel outweighs the government's interest in forfeiting bona fide attorneys' fees. The only interest of the government lies in preserving the availability of the defendant's assets so that they may be forfeited after a possible guilty verdict at trial. That interest is essentially punitive—to deprive the guilty defendant of the enjoyment of the fruits of his illegal activity. United States v. Unit No. 7 and Unit No. 8, 853 F.2d at 1451; United States v. Lizza Industries, 775 F.2d 492, 498 (2d Cir. 1985). Although the ABA fully supports the government's legitimate interest in using the forfeiture laws to punish convicted criminals, that interest is not sufficiently compelling to overcome the primacy of a defendant's interest in choosing his counsel prior to trial.

Indeed, the forfeiture of assets otherwise destined for payment of—or actually paid as—bona fide attorneys' fees serves little, if any, punitive value. Assets properly paid to counsel would be inaccessible to the defendant in any event, thus depriving the defendant of their economic

Ocontrary to the Fourth Circuit, the Eighth and Tenth Circuits recognize that fee restraints and forfeitures affect a defendant's right to choose counsel, thus requiring a weighing of the government's interests against the defendant's qualified Sixth Amendment right to choose counsel. United States v. Unit No. 7 and Unit No. 8. 853 F.2d 1445, 1450-51 (8th Cir. 1988); United States v. Nichols, 841 F.2d 1485, 1502 (10th Cir. 1988); See also United States v. Monsanto, 852 F.2d 1400, 1402 (2d Cir. 1988) (Feinberg, J. with Oakes & Kearse, JJ. concurring). On the other hand, the Seventh Circuit, which has adopted the Fourth Circuit's conclusion that the relation back doctrine divests a defendant of any interest in allegedly forfeitable assets prior to trial, has nonetheless held that, before trial, a defendant has a sufficient interest in using his property to pay counsel to warrant the Fifth Amendment protections of due process. See United States v. Mova-Gomez, 860 F.2d 706. 725-26 (7th Cir. 1988).

value. United States v. Thier, 801 F.2d at 1474-75. In contrast, the clear and direct infringement on a defendant's constitutional rights wrought by fee forfeiture would be substantial.

Nor should this Court sanction the Fourth Circuit's suggestion that the general penal goals underlying the forfeiture statute should encompass efforts to strip defendants of their ability to hire private qualified defense counsel. Contrary to the Fourth Circuit's majority opinion, neither the CFA nor its legislative history contains any evidence of a Congressional intent to prevent payment of legitimate attorneys' fees either before, during or after trial. Moreover, while weakening the ability of an accused to defend himself at trial by denying him private counsel of choice undoubtedly would provide a significant advantage to the government, the ABA believes such objectives to be both an illegitimate exercise of government power and constitutionally infirm. See United States v. Monsanto, 852 F.2d at 1403 (Feinberg, J. with Oakes & Kearse JJ., concurring). The impairment of a defendant's right to select counsel even before a verdict of guilt is obtained would amount to little more than imposition of punishment prior to trial in clear violation of the accused's right to due process of law.

The grave ramifications caused by fee forfeiture will often be sufficient to deprive a defendant of any ability to retain counsel of choice prior to an adjudication of guilt or innocence. Even those defendants with sufficient, presumptively legal, assets to retain counsel of choice may well be unable to do so because of the chilling effect of possible restraints or forfeiture on counsel's willingness to undertake representation. \*\*United States v.\*\*

Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); United States v. Estevez, 645 F. Supp. 869, 871 (E.D. Wis. 1986). The government's nominal interest in preserving assets for possible forfeiture cannot justify this serious erosion of Sixth Amendment rights.

B. The Prior Restraint and Forfeiture of Bona Fide Attorneys' Fees Violates the Defendant's Sixth Amendment Right to Effective Assistance of Counsel.

The use of the forfeiture laws against bona fide attorneys' fees also deprives the defendant of the attorney-client relationship necessary for the effective assistance of counsel guaranteed by the Sixth Amendment.

If attorneys' fees are subject to forfeiture after trial, defense counsel's collection of earned fees is contingent on the outcome of the trial—a situation that raises serious ethical concerns. The ABA Model Rules of Professional Conduct declare: "A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case." Model Rules of Professional Conduct Rule 1.5(d)(2). See also Model Code of Professional Responsibility DR 2-106(C).

In addition, the Rules prohibit representation of a client in a matter affecting the attorney's personal financial interests. Rule 1.7(b) of Model Rules of Professional Conduct; see also Model Code of Professional Responsibility DR 5-101(A). Defense counsel faces an intolerable conflict of interest created by his pecuniary interest in the outcome of the litigation. If counsel fees are indeed forfeited at trial, the sole statutory mechanism for relief lies in a post-trial hearing at which defense counsel bears

<sup>&</sup>lt;sup>10</sup> As this Court has recently observed, "It is a rare attorney who will be fortunate enough to learn the entire truth from his client, much less be fully apprised of what each of the government's witnesses will say on the stand." Wheat v. United States, 108 S.Ct. 1692, 100 L.Ed.2d 140, 152 (1988). If fee forfeiture is permitted,

both of these rare events will have to occur before defense counsel could have any degree of confidence that his fees would be safe from possible forfeiture.

the burden of proving his ignorance of the facts which support the forfeiture verdict. See 21 U.S.C. § 853(n) (6); 18 U.S.C. § 1963(m) (6). Whereas, before and during trial, counsel must investigate and master all relevant evidence to defend his client, after trial, counsel must prove his ignorance of both the facts leading to fee forfeiture and the government's forfeiture contentions. Thus, "the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with the proceeds of illegal activity. United States v. Reckmeyer, 631 F. Supp. 1191, 1197 (E.D. Va. 1986), aff'd, 814 F.2d 905 (4th Cir. 1987), rev'd sub nom. United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988) (en banc).

Defense counsel faces other conflicts of loyalty as well that pose serious dilemmas under the ethical rules that guide the legal profession. For example, defense counsel will have a conflict in advising his client about a possible plea bargain that touches upon the forfeitability of the defendant's assets. Conflicts affecting such negotiations have been noted by a number of courts. See United States v. Bassett, 632 F. Supp. 1308, 1316 n.5 (D. Md. 1986), aff'd, 814 F.2d 905 (4th Cir. 1987), rev'd sub nom. United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988) (en banc); United States v. Reckmeyer, 631 F. Supp. at 1197; United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985).

Finally, a statutory scheme that makes a litigable issue out of the state of defense counsel's knowledge risks a profound intrusion on attorney-client communications. Trial and grand jury subpoenas may be issued to defense counsel to testify regarding the amount and

method of fee payments so as to demonstrate the forfeitability of the payments.<sup>12</sup> These place defense counsel in the untenable position of being a witness against his own client.<sup>13</sup> Such inquiries before, during, and after trial, which necessarily focus on counsel's knowledge of the defendant's financial activities, will chill attorneyclient communications.

These multiple conflicts of interest are not answered, as the Fourth Circuit suggested below, by assuming that counsel, acting within the bounds of the canons of ethics, will be able to overcome them. Even the most conscientious defense attorney, faced with the prospect of an actual personal conflict with his client, may find it difficult to provide the undivided loyalty and independent judgment that professional ethics require and that the Constitution presupposes in protecting the accused's right to the effective assistance of counsel. See, generally Strickland v. Washington, 466 U.S. 668 (1984).

Moreover, wholly apart from the corrosive influence a conflict of interest has on counsel's ability to provide independent judgment to his client, judicial tolerance of such conflicts will undermine public confidence in the integrity of our criminal justice system. As this Court recently observed, "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 108 S.Ct. 1692, 100 L.Ed.2d 140, 149 (1988).

<sup>&</sup>lt;sup>11</sup> Counsel thus also has a financial interest in not placing his factual and legal knowledge about the potential forfeitability of the defendant's assets on the record during the course of the criminal proceedings.

<sup>&</sup>lt;sup>12</sup> In February, 1986, the ABA House of Delegates adopted a resolution endorsing a requirement for prior judicial review of subpoenas directed at defense counsel by the prosecution. The supporting ABA Report carefully analyzes the chilling effect of subpoenas on the attorney-client relationship.

<sup>&</sup>lt;sup>13</sup> The ABA Model Rules generally forbids representation in any case in which counsel may be called as a witness, see Model Rule 3.7; Model Code DR 5-102.

Nor is it an answer, as the Fourth Circuit suggested below, that ineffective assistance of counsel claims based on conflicts of interest are "properly reviewed only on the individual facts of a particular case." United States v. Caplin & Drysdale, 837 F.2d at 647. As this Court has held, when a defense attorney labors under an actual conflict of interest, "prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." Strickland v. Washington, 466 U.S. at 692; United States v. Chronic, 466 U.S. 648, 662 n.31 (1984).

The use of a pre-trial mini-hearing, as suggested by the panel opinion in *Monsanto*, will not eliminate these problems, but will simply advance the moment at which they become apparent. Initially, the defendant must face the question of who will represent him at the pre-trial mini-hearing. Retained counsel may be unwilling to prepare for a hearing addressing both the guilt of the defendant and the forfeitability of the defendant's assets when the fee for such work is uncertain.

In any event, assuming that the defendant retains counsel to handle the mini-hearing, almost every aspect of preparation will create difficult ethical questions. Because of the importance of the mini-hearing to both counsel's continued role and the defendant's choice of representation, the pressures will be strong to accelerate discovery and prepare in depth for the mini-hearing. Such preparation, in turn, will increase the stakes. Consequently, the term "mini-hearing" may well be a misnomer as defense counsel may have a personal interest in protracting the proceedings to challenge the government's contentions.

Should the government prevail at the mini-hearing, however, retained counsel, as a practical matter, may be required to withdraw because full payment of his fee would be contingent on the outcome of the trial. In addition, if trial results in an adverse verdict on the forfeiture allegations, the only means for counsel to recover

for effort previously invested in the case would be to demonstrate, at a post-trial forfeiture hearing, a lack of knowledge that any payments made to counsel stemmed from forfeitable assets. See 18 U.S.C. § 1963(l); 21 U.S.C. § 853(n)(6). Thus, even prior to the minihearing, retained counsel must deal with the dilemma that any knowledge he acquires to prepare for the minihearing may later be used against him to preclude post-trial relief.

The appointment by the court of different counsel to handle the mini-hearing or other aspects of pre-trial preparation would have other disadvantages. First, current law does not generally permit appointment of counsel before initiation of formal adversary judicial proceedings. See United States v. Hershon, 625 F. Supp. 735 (D. Mass. 1986) (no constitutional right to appointment of counsel for grand jury witness). In contrast, private counsel are frequently retained months or even years earlier. By the time a public defender or other counsel has been appointed, the defense attorney will have confronted all of the conflicts discussed above and the defendant's legitimate interests may already have been compromised.

Moreover, the forced substitution of appointed counsel late in the criminal proceeding places appointed counsel at a distinct disadvantage. Our system of appointed representation is designed to serve the truly indigent and can ill afford the burdens associated with systematic substitution of appointed counsel into both complex and even routine criminal cases. See Concerning Forfeiture of Attorneys' Fees: Hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986) (statement of Federal Public Defender Edward Marek, on behalf of Federal Public Defenders and Federal Community Defenders). The immediate consequences of this added burden will fall on truly indigent defendants, who will now compete with non-indigent defendants for the

dwindling and overtaxed resources of appointed federal defenders.

Finally, the timing of an application for a pretrial restraining order, and the invocation of the relation back doctrine are left, in the first instance, to the unfettered discretion of the prosecution. See 21 U.S.C. §§ 853(c), (e); 18 U.S.C. §§ 1963(c), (e). As a practical result, such a restraining order will likely cause counsel to withdraw, because many lawyers may not wish to handle such cases without compensation. This would vest the prosecution with the discretionary authority to disengage the services of chosen defense counsel at any stage in the criminal proceeding. The prospect of the government exercising a veto power over the attorney-client relationship casts a cloud over the effective representation provided by counsel. This Court has already determined that: "Government violates the right to effective assistancen when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. at 687; Walberg v. Israel, 766 F.2d 1071, 1076 (7th Cir.), cert. denied, 474 U.S. 1013 (1985).

For these reasons, neither the requirement of a minitrial nor the appointment of counsel will eliminate the substantial concerns about the effectiveness of the legal assistance provided to the defendant where fee payments are subject to forfeiture.

# III. IF THE CFA PERMITS FEE RESTRAINTS AND FEE FORFEITURE, IT VIOLATES THE ACCUSED'S RIGHT TO DUE PROCESS.

Fee forfeiture also violates due process because it gives the government an ability to control the resources of the defense. The Due Process Clause "does speak to the balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 475 (1973). "There can be no fair trial unless the accused receives the serv-

ices of an effective and independent advocate." Polk County v. Dodson, 454 U.S. 312, 322 (1981).

Prior restraints and subsequent forfeiture of bona fide fees enable government counsel to determine who will be his adversary, to restrict the resources available to present a defense, and even to determine the time when chosen counsel will withdraw. The independence of defense counsel is compromised by the prospect of continued representation only by the grace of the prosecution. Fundamental fairness, which is guaranteed by the Fifth Amendment, see Estelle v. Williams, 425 U.S. 501, 505 (1976); Powell v. Alabama, 287 U.S. 45, 63 (1932). demands that the defendant not be handicapped in this way in the presentation of his defense. A system that affords one party to a controversy the discretion to restrict the resources available to its opponent to contest the very allegations at issue is no longer an adversarial system within the rubric of our American tradition.

The confidence that our society must place in the judgments entered in our criminal justice system requires nothing less than a test of the evidence by true adversaries. Our system of criminal justice is predicated on the assumption that the vigorous assertion of a defendant's rights "will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Chronic, 466 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862 (1975)). Our adversary system demands that the government prevail by proving its allegations, not by crippling an accused's ability to mount a defense.

### CONCLUSION

For the foregoing reasons, the ABA submits that the prior restraint and forfeiture of bona fide attorneys' fees paid for services legitimately rendered in defending a criminal charge are not encompassed by the forfeiture statutes and are not tolerated by the United States Constitution.

Respectfully submitted,

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January, 1989.

Supreme Court 11,8 FILED

DEC 27 1908

Nos. 87-1729 and 88-

1.

JOSEPH F. STANIOL JR.

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1988

CAPLIN & DRYSDALE, CHARTERED, Petitioner,

VS.

UNITED STATES OF AMERICA. Respondent.

UNITED STATES OF AMERICA, Petitioner,

VS.

PETER MONSANTO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND SECOND CIRCUITS

> JOINT AND COMBINED AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL NETWORK FOR THE RIGHT TO COUNSEL, THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPON-DENT MONSANTO IN NO. 88-454

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2431 (1971)	71
130 Cong. Rec. (1984)	83
J. Freedman, Crisis and	-
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Hamilton, The Federalist No. 78,	
in The Federalist Papers	
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" 5 P N- 045 P 7 0044	
H.R. Rep. No. 845, Part I, 98th Cong., 2d Sess. (1984)	77
cong., 2d Sess. (1984)	11
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Crime"?, 39 Stan. L. Rev.	
663 (1987)	85
1 F. Pollock & F. Maitland,	
The History of the English	
Law (2d ed. 1898)	14

The Pandom House Dictionary				I	Page
The Random House Dictionary					
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(2d ed. unabridged 1987)		•		-	71
L. Rutherford, John Peter					
Zenger: His Press, His					
Trial and a Bibliography					
of Zenger's Imprints					
(1904)					18
(,					
B. Schwartz, Administrative					
Law (1976)					90
<u>Law</u> (1970)	•		•		30
C D N- 225 00++ C					
S. Rep. No. 225, 98th Cong.,					
lst Sess. 200-01 (1983),					
1984 U.S. Code Cong. &					
Admin. News 3182					
				80,	81
3 J. Story, Commentaries on th	ne				
Constitution 606 (1833).	-				16
2 A Sutherland, Statutory Con-	_				
struction § 48.01 (4th					
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ed. 1973)		•	•		10
The Triel of Deter Zener (V					
The Trial of Peter Zenger (V.					10
Buranelli ed. 1957)	•				18
L. Tribe, American Constitu-					
tional Law (2d ed. 1988)	•-				90
Tribe, The Emerging Reconnect:	ion	1			
of Individual Rights and					
stitutional Design: Feder	cal	is	m.		
Bureaucracy and Due Pro	200	0	111 /	-	
Bureaucracy, and Due Proc of Lawmaking, 10 Creighto	.63	3			
or Lawmaking, 10 Creighto	nc				00
L. Rev. 433 (1977)		•	•		90
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Dictionary (unabridged ed	1.				
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Nos. 87-1729 and 88-454

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1988

CAPLIN & DRYSDALE, CHARTERED,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

VS.

PETER MONSANTO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND SECOND CIRCUITS

JOINT AND COMBINED AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL NETWORK FOR THE RIGHT TO COUNSEL, THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

### STATEMENT OF INTERESTS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit

corporation with a membership of more than 5,000 lawyers, including citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The NACDL is thus uniquely able to express the concern of criminal defense attorneys and their clients about what it considers to be the unauthorized and unconstitutional use by the Department of Justice of the Comprehensive Forfeiture Act of 1984 to restrain or forfeit assets needed by the accused to retain private counsel of his or her own choosing. The NACDL is concerned that the power claimed by the Department of Justice poses a grave danger to our adversary system of justice. The NACDL has appeared in fee forfeiture cases as amicus curiae

and has provided testimony on that subject to the United States Congress.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members. The New York Civil Liberties Union (NYCLU) and the American Civil Liberties Union of Virginia (ACLU of Virginia) are the state affiliates of the ACLU in the two states in which the present actions arose. The ACLU was founded in 1920 as an organization dedicated to the defense of individual rights. In pursuit of that goal, the ACLU and its state affiliates frequently appear in federal and state courts throughout the country. Among the most fundamental of liberties is the right of an accused to the assistance of counsel, without which the assertion of other constitutional rights by the accused would be rendered virtually meaningless. In the view of ACLU and its state affiliates, the primary and preferred

method of exercising the right to counsel is through the retention of counsel of choice. This fundamental right, so critical to our adversary system, is placed at grave risk by the application of forfeiture statutes to legitimate attorneys' fees.

The National Network for the Right to Counsel (NNRC) is a national organization established in early 1986 to defend the right to counsel against government intrusion and abridgement. The NNRC has filed amicus briefs in fee forfeiture cases and in other cases involving the protection of The NNRC attorney-client relationships. has also co-sponsored conferences on these issues at Harvard Law School and New York University School of Law, attended by members of the bar, the judiciary, law school faculties, state legislatures, and the United States Congress. The NNRC shares the concern of other amici curiae that the burgeoning deployment of forfeiture

persons of assets needed to hire defense counsel threatens basic values of our society and should, therefore, be stopped.

## INTRODUCTION TO AND SUMMARY OF ARGUMENT

This point is elemental: The Sixth Amendment guarantee that "the accused shall enjoy the right to have the Assistance of Counsel for his defence" establishes a substantive quarantee prohibiting the Sovereign from using unproven forfeiture allegations to defeat the ability of the accused to employ private counsel of his or her own choosing. The right to use one's own property to hire one's own counsel is the primary and preferred Sixth Amendment right. The trial of John Peter Zenger, which epitomizes that right, was the model our Founding Fathers had in mind.

The Government argues that the right of the accused to be defended by counsel of

his own choosing is such a weak and qualified right that it can be defeated by the simple expedient of seeking to forfeit the assets of the accused. The Government insists that the accused is not prejudiced by its freezing his chosen Champion from appearing, because the Sovereign will select a replacement for him--an appointed counsel.

we answer that freedom to choose one's own advocate is a cherished right, dignified by our history and traditions. The right to counsel of choice protects and promotes a host of values such as the autonomy of the citizen accused; his trust and confidence in defense counsel; salutary participation by the accused in the legal process; a strong and independent adversary system; accuracy in decisionmaking; free expression of advocacy in an important public forum; and public confidence in the fairness and integrity of the criminal

justice system. Thus, the right to hire defense counsel of one's own choosing is distinct and separate from the right to have some lawyer (any lawyer) appointed by the court. Lawyers are not fungible commodities.

No right--not even free speech--is absolute; but it takes an extraordinary, compelling state interest to totally abridge the right to counsel of choice, as the application of the forfeiture provisions would do here. The Government's interest in forfeiture does not suffice, at least where the attorneys' fees involved are legitimate; that interest is fully met by limiting forfeiture to sham or fraudulent transfers to attorneys or others.

The Government's only legitimate interest justifying such forfeiture pursuits is to strip wrongdoers of their ill-gotten gains and their power to commit future crimes. Forfeiture is not sanctioned as a

vehicle for raising revenue to support the Government. Forfeiture is not licensed as a device for shunting skilled but ethical lawyers away from our criminal courtrooms. Accordingly, the Government's proper interest is not frustrated by releasing some of the assets to defense counsel. By "forfeiting" these assets to the lawyer, the accused is separated from his property--whether ill-gotten or otherwise; and the defendant's freedom to have counsel of choice is accommodated. This reconciliation of the Government's interests and the defendant's rights also protects the public interest in preserving an independent private defense bar and safeguarding our adversarial system of justice.

Unless the forfeiture statutes are read to allow this accommodation of the defendant's right to retain counsel, they violate the Sixth Amendment. Alterna-

tively, if the Court is not certain whether Congress really decided to grant Executive Branch prosecutors such awesome, unfettered discretion to aim these statutes at their adversaries, it should hold ultra vires the application of forfeiture authority to legitimate attorneys' fees in criminal cases. Basic principles of statutory construction compel this result. E.g., Thompson v. Oklahoma, 487 U.S.---, 108 S. Ct. 2687, 2706, 101 L.Ed. 2d 702, 728 (1988) (O'Connor, J., concurring); Kent v. Dulles, 357 U.S. 116 (1958); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

We are deeply concerned about the prosecution's trailblazing use of forfeiture to cripple the accused before the trial has even started. Its chief legal theory, the "relation back" doctrine, is argued as if punishment first and trial later were acceptable procedure. United States v. Monsanto, 852 F.2d 1400, 1404 (2d

Cir. 1988) (en banc) (Oakes, J., concurring) (alluding to L. Carroll, Through the Looking Glass and What Alice Found There (1896)). The defendant is presumed guilty. This theory not only "completely begs the question," United States v. Unit No. 7 and Unit No. 8, (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988); by shackling the accused in making his defense, it also threatens to become a self-fulfilling prophecy.

In the short run, the Department of Justice's theory will remove private counsel from many of those cases where their skills are most needed. All prosecutions which can be made into a RICO case.

See 18 U.S.C. § 1961(1) (the ever-growing list of RICO predicate crimes). All CCE drug cases. 21 U.S.C. § 848. But the criminal forfeiture amendments do not apply just to CCE drug cases. They apply to all felony drug cases. 21 U.S.C. § 853(a).

In the long run, the DOJ's experiment

threatens to wreck the adversary system of justice. Criminal and civil forfeiture is being urged as the latest answer in the war on crime, and use of forfeiture is rapidly expanding. More forfeiture laws surely will be enacted. Further, if the Government can use forfeiture theory to freeze or seize assets before they are wielded in defense of the accusations or void the payment to counsel after the trial is over, the principle will not stop there. prosecution may well next claim necessity to seize the defendant's assets so that they will be available to pay fines and make restitution. Given the 1984 burst in the size of federal felony fines to \$250,000 per count for individuals, 18 U.S.C. § 3571(b), and the authorization of alternative fines based on pecuniary gain to the defendant or loss to the victim, doubled, 18 U.S.C. § 3571(d), few accused persons will be able to enjoy the assis-

tance of retained counsel. Given the penchant of the States to follow the Federal example, all these pernicious practices will spread. Eventually, they will be ubiquitous. The power to accuse will entail the power to paralyze the financial resources of the defendant and--for the crucial practical purpose of defending against the accusations -- to render the defendant a pauper at the bar of justice. Then, we fear, the prosecution will be able to exclude private counsel for almost any person accused of any felony in any court. When that day arrives, we will have nationalized the Sixth Amendment and socialized the criminal defense practice. No wonder the American Bar Association, present amici curiae and most of the legal community are so alarmed. If we do not want to see that day, the Government's experiment must be stopped here and now.

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We do not rely upon rhetoric. An

overwhelming body of law and logic repel the Government's onslaught.

## ARGUMENT

- I. APPLICATION OF FORFEITURE PROVISIONS TO LEGITIMATE ATTORNEYS' FEES UNCONSTITUTIONALLY INFRINGES ON THE SIXTH ALENDMENT RIGHT TO COUNSEL OF CHOICE AND THREATENS TO UNDERMINE THE ADVERSARY SYSTEM OF JUSTICE
- A. The Fundamental Right to Counsel of Choice

Although like many fundamental constitutional rights, the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it, the right is unquestionably an "essential component" or "essential element" of the Sixth Amendment. E.g., United States v. Phillips, 699 F.2d 798, 801 (6th Cir. 1983), rev'd on other grounds, 733 F.2d 422 (6th Cir. 1984) (en banc). Moreover, although the right to appointed counsel is now recognized, Gideon

v. Wainwright, 372 U.S. 335 (1963), the right to counsel of choice was the primary right the Sixth Amendment was designed to protect. This is revealed by an examination of the historical origins of the Amendment, and of the most celebrated trial of the colonial period, the trial of John Peter Zenger, which stands as a vindication of the right to retain counsel of choice and an early demonstration of the importance of that right.

In essence, the Sixth Amendment was a reaction against the prior English practice which prohibited counsel in serious criminal cases. The defendant was required to "appear before the court in his own person and conduct his own cause in his own words." Faretta v. California, 422 U.S. 806, 823 (1975) (quoting 1 F. Pollock & F. Maitland, The History of the English Law 211 (2d ed. 1898)); Argersinger v. Hamlin, 407 U.S. 25, 30 (1972); Betts v. Brady,

bama, 287 U.S. 45, 60 (1932); W. Beaney,

The Right to Counsel in American Courts
8-10 (1955). The English common law

practice of prohibiting a defendant from

being represented by counsel in felony and

treason cases was "so outrageous and so

obviously a perversion of all sense of

proportion that the rule was constantly,

vigorously and sometimes passionately

assailed by English statesmen and lawyers."

Powell, 287 U.S. at 60.

The English rule was clearly rejected by the colonies even before adoption of the federal Constitution. See Holden v. Hardy, 169 U.S. 366, 386 (1898) ("to the credit of [England's] American colonies let it be said, that so oppressive a doctrine had never obtained a foothold there."). Thus, at the time of the adoption of the federal Constitution, the constitutions of the states guaranteed "that a defendant is not

to be denied the privilege of representation by counsel of his choice." Betts, 316 U.S. at 468. It was protection of the right to counsel of choice that the Sixth Amendment contemplated when it guaranteed the right of the accused "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. By rejecting the English practice that had denied the accused the right to appear through counsel in felony and treason cases, "[t]he Sixth Amendment extended the right to counsel beyond its common law dimensions." Argersinger, 407 U.S. at 30. The Amendment was not, however, regarded as providing a right to appointed counsel. Bute v. Illinois, 333 U.S. 640, 660-66 (1948); W. Beaney, supra, at 28-29. The right to counsel it protected was "the right to retain counsel of one's own choice and at one's own expense." Id. at 21; see Bute at 661. 3 J. Story, Commentaries on the Constitution

606 (1833) (the "right to have . . . counsel employed for the prisoner").

Moreover, the colonists would have been surprised, to say the least, at the notion that a defendant could be deprived of the right to retain his own counsel and ordered to stand trial instead with counsel selected by the court. The most famous trial of the colonial era, one that had a profound effect on the Framers—the trial of printer John Peter Zenger—stands as a vindication of the right to appear through chosen counsel rather than one appointed by the court.\*

York in 1735 for seditious libel based on his printing a newspaper critical of the Governor of the colony, the tyrant William Cosby. See generally J. Alexander, A Brief Narrative of the Case and Trial of John

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<sup>\*</sup>To our knowledge, the Zenger trial has not been brought to the attention of any court in any previous fee forfeiture litigation which has reached judgment.

Peter Zenger, Printer of the New York Weekly Journal (S. Katz ed. 2d ed. 1972) (hereinafter cited as "Katz"); The Trial of Peter Zenger (V. Buranelli ed. 1957); L. Rutherfurd, John Peter Zenger: His Press, His Trial and a Bibliography of Zenger's Imprints (1904). Two noted New York lawyers who had been leaders in the political movement opposing Cosby, James Alexander and William Smith, came to Zenger's defense. Judge James DeLancey, a Cosby lieutenant appointed by the Governor as Chief Justice of the New York Supreme Court, presided at the trial. He rebuffed the lawyers' attempts to win Zenger's release and set an excessive bail. the defense attorneys challenged DeLancey's authority to act as judge, DeLancey responded by disbarring them. This unprecedented order disbarring Alexander and Smith was a partisan "tactic to deprive Zenger of competent legal counsel, since

there were few lawyers in New York at the time and probably none so skilled as Smith and Alexander." Katz, supra, at 21.

Following the disbarment of his attorneys, Zenger, without funds, immediately petitioned the court for appointment of counsel. DeLancey obliged him by appointing John Chambers, "a competent lawyer but a Governor's man." Katz, supra, at Zenger's allies were conterned, and 21. Alexander and Smith began to look for another lawyer to try the case. Alexander, although disbarred, had continued to work on the case, and developed a more daring strategy than the conventional one conceived by Chambers. The plan was to base Zenger's defense on the truth of the newspaper articles, trying Cosby in the process, and on that basis to seek a jury acquittal on the libel charges. Alexander engaged Andrew Hamilton, a distinguished attorney from the neighboring colony of

Pennsylvania, to execute the defense plan.

Hamilton took over the defense following Chambers' opening statement and made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing truth. Admitting that Zenger had published the statements in question, he asserted that the printer could not, however, be convicted of libel for printing the truth. Judge DeLancey instructed the jury that it was to determine only whether Zenger had published the statements, leaving the law of libel to the court. But the jury acquitted Zenger.

Had Judge DeLancey prohibited Zenger's representation by counsel of choice and insisted on Zenger appearing through the young court-appointed lawyer, an important chapter in American history would have been different. The trial of John Peter Zenger played a significant role in establishing the American tradition of an independent

criminal defense bar serving as a meaningful check against a partisan or corrupt
judge or prosecutor. The Zenger trial and
the importance of the right to representation by counsel of choice were fresh in the
minds of the Framers when they drafted the
Sixth Amendment.

Long before it was regarded as a source for the right to appointed counsel, the Sixth Amendment thus quaranteed the fundamental right to retain counsel of Indeed, when this Court in 1932 choice. first recognized a qualified right to appointment of counsel in capital cases as a matter of due process, it referred to it as "a logical corollary from the constitutional right to be heard by counsel." Powell, 287 U.S. at 72. And in 1942 in discussing the right to self-representation the Court referred to the Sixth Amendment as embodying "the correlative right to dispense with a lawyer's help." Adams

v. United States ex rel. McCann, 317 U.S. 269, 279 (1942), cited with approval in Faretta, 422 U.S. at 815. If the right to appointment of counsel and the right to self-representation are "corollaries," then the right to be heard by counsel of choice must be the primary right.

This basic component of the constitutional right to counsel is separate and distinct from the right to appointed counsel, which it significantly predated. The right to counsel "includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to 'a fair opportunity to secure counsel of his own choice.'" Crooker v. California, 357 U.S. 433, 439 (1958). "[A] defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." Chandler v. Fretag, 348 U.S. 3, 10 (1954).

B. The Right to Counsel of Choice Is Not Satisfied by Provision of Appointed Counsel

This right to counsel of choice, so dignified by our constitutional history and traditions, would not be satisfied by the provision of appointed counsel, the result that the Government contends will fully meet the requirements of the Sixth Amendment. Even assuming that appointed counsel would provide the effective assistance of counsel mandated by the Sixth Amendment, this contention misconceives the separate and distinct nature of the right to counsel of choice. See United States v. Unit No. 7 and Unit No. 8 (Kiser), 853 F.2d 1445, 1451 (8th Cic. 1988) ("[W]e reject the government's argument that even if its action should push Kiser into indigency, the Sixth Amendment would be fully vindicated by offering him appointed counsel . . . . This is an extraordinarily impoverished view of the non-indigent's right.

essence it collapses the two distinct rights into one, the lesser.").

The "essential aim" of the Sixth Amendment may be, as Mr. Chief Justice Rehnquist recently stated in Wheat v. United States, 486 U.S. ---, 108 S. Ct. 1692, 1697, 100 L.Ed. 2d 140, 148 (1988), "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer who he prefers." But a criminal justice system relying on appointed rather than retained counsel would not be the adversary system contemplated by the Sixth Amendment, no matter how effective such appointed advocates Where the Government seeks to deprive a defendant not of a particular preferred counsel, as in Wheat, but of the opportunity to select any counsel, giving him a competent appointed lawyer will not satisfy the principles of the Sixth Amendment.

We believe that the Sixth Amendment right of the accused to hire private counsel promotes transcendent values: free choice or autonomy in a momentous contest between the citizen and the Sovereign; salutary participation in the legal process; and free expression of advocacy in a public forum. As to free choice, in other contexts the federal courts have rejected the contention that deprivation of the right to counsel of choice can somehow be cured by provision of appointed counsel:

The government argues that Rankin was competently represented by appointed counsel at trial. That, however, is not a relevant A defendant who consideration. is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice. "Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." Flanagan v. United States, 465 U.S. 259, 268 . . . (1984). In this respect, the denial of one's selected lawyer is quite

different from a claim of ineffective counsel where a harmless error test is appropriate. The right at stake here is similar to that of self-representation. "The right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 . . . (1984). See also United States v. Laura, 607 F.2d 52, 58 (3d Cir. 1979) (defendant "need not show that the dismissal [of counsel] was prejudicial.").

United States v. Rankin, 779 F.2d 956, 960-61 (3d Cir. 1986). Federal courts have also held that denial of the right to counsel of choice does not require a showing of prejudice. Rather, the right is "so fundamental that any interference cannot be deemed harmless error" and must result in automatic reversal even where the defendant was provided the effective assistance of counsel through appointed counsel. United States v. Romano, 849 F.2d 812, 820 (3d Cir. 1988); accord, United States v. Panzardi Alvarez, 816 F.2d 813, 816 (1st Cir. 1987); Rankin, 779 F.2d at 960-61; Gandy v. Alabama, 569 F.2d 1318, 1323-26 (5th Cir. 1978); Wilson v. Mintzes,

761 F.2d 275, 285-86 (6th Cir. 1985); <u>United States v. Lewis</u>, 759 F.2d 1316, 1326-27 (8th Cir.), <u>cert. denied</u>, 479 U.S. 994 (1985); <u>United States v. Ray</u>, 731 F.2d 1361, 1365 (9th Cir. 1984).

This approach is grounded in recognition that the right to counsel of choice serves substantial interests apart from the general interest in accuracy in adjudication. "[W]ere a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). "[T]he right to counsel of choice, like the right to self-representation, is premised on respect for the individual . . . . Mintzes, 761 F.2d at 286. See Faretta, 422 U.S. at 835 (recognizing

right of self-representation out of "that respect for the individual which is the lifeblood of the law."). The defendant's basic right to choose the type of defense he wishes to mount also supports the right to select counsel of choice, "[f]or the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979). Moreover, "the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." Id. at 57; ABA Standards for Criminal Justice 4-29 (2d ed. 1980) (commentary) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."). None of these policies underlying the right to

the right to appointed counsel or by the right to the effective assistance of counsel, "since, unlike the right to counsel of choice, 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" Mintzes, 761 F.2d at 285 (quoting United States v. Cronic, 466 U.S. 648, 658 (1984)).

In this respect, the right to the assistance of counsel of choice is like the right to self-representation, see Rankin, 779 F.2d at 960-61, and like that right, its deprivation cannot be remedied by the provision of appointed counsel, no matter how competent such appointed counsel may be. See Faretta, 422 U.S. at 820 ("To thrust counsel upon the accused against his considered wish,

thus violates the logic of the [Sixth] Amendment"); id. at 833 ("the notion of compulsory counsel was utterly foreign" to the Founders). Without some compelling justification, forcing a public defender or other appointed counsel on a defendant otherwise able to hire his own counsel and desiring to do so thus would infringe the Sixth Amendment. Requiring such an unwanted counsel instead of the counsel of defendant's choice would be as offensive to the Sixth Amendment as insisting on unwanted counsel when defendant's choice is self-representation. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not his defense." Faretta, 422 U.S. at 821 (emphasis by the Court).

Allowing the defendant to select his own counsel honors his right to free choice and autonomy in a matter of vital concern to him, see Faretta, 422 U.S. at 806-07 ("those who wrote the Bill of Rights . . . understood the inestimable worth of free choice."), and best effectuates the values underlying the right to counsel by maximizing the trust and confidence between client and attorney that are preconditions to its successful exercise.

Permitting the accused to select his own counsel also promotes his interest in having assistance independent of the Sovereign which is prosecuting him and judging him. It further promotes the public interest in preserving an independent private criminal defense bar. In our system of justice it is essential that judges be independent, see The Federalist No. 78 (Hamilton), in The Federalist Papers 226 (R. Fairfield ed. 1961), that juries be

more independent, see <u>Duncan v. Louisiana</u>, 391 U.S. 145, 155-56, (1968), and that defense counsel be most independent.

On the other hand, forcing the accused to have lawyers selected, recruited, trained, paid and/or supervised\* by the Sovereign defies the value of free choice, jeopardizes independence, and undermines the defendants' trust in the system and their reconciliation with any adverse results of the proceedings. Cf. Polk County v. Dodson, 454 U.S. 312, 325 n.17 (1981) ("Our adversary system functions best when a lawyer enjoys the whole-hearted confidence of his client.") And, in the long run, allowing the prosecution to keep private defense counsel out of major criminal trials will destroy public confidence in the impartiality and integrity of

<sup>\*</sup>The reality, of course, is that many public defender offices and most court appointment systems lack adequate capacity to recruit, train and supervise their lawyers as professionals.

our system of justice.\*

Speaking of the public interest, permitting representation through counsel of choice promotes precious values of public advocacy. The use of counsel by a criminal defendant to assert rights on his behalf is protected by the First Amendment "right to hire attorneys on a salary basis to assist . . . in the assertion of . . . legal rights." See, e.g., United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967); accord, Matter of Abrams, 62 N.Y.2d 183, 196, 476 N.Y.S.2d 494, 500-01, 405 N.E.2d 1, 7 (1984) (First Amendment protects criminal defendant's

<sup>\*</sup>We are also concerned about the terrible ethical problems unleashed by the prosecution's use of the forfeiture statutes to pursue assets the accused needs to hire private defense counsel. Application of the forfeiture statutes to legitimate attorneys' fees would totally destroy the right to counsel of choice by rendering private counsel financially and ethically unable to represent clients in such cases. These considerations are ably presented in the Brief Amicus Curiae of the American Bar Association in Support of the Petitioner Caplin & Drysdale in No. 87-1729 and the Respondent Monsanto in No. 88-454, so we need say no more.

right to counsel of choice). Moreover, what is said in the courtroom--as public a forum as there is, see, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) -- is a matter of vital First Amendment concern. From the John Peter Zenger trial to this very day, who appears in court and what he or she advocates there makes an enormous difference to the justice system and to our entire society. By keeping any advocate chosen by the accused from ever entering the door of the courtroom, the Government's actions have barred from this marketplace of ideas the communications of the defendant -- the object of the controversy--in the form and by the advocate he has chosen to make them. Instead of the free market of ideas that the right to counsel of choice best promotes, the Government would substitute the public monopoly of appointed counsel. Restricting this vital forum to public defenders or

court-appointed lawyers would be analagous to permitting newspapers to report whatever a political candidate wished to communicate to the public, but requiring that all reporters be either government employees or free-lance reporters selected by the government and paid at substantially below market rates. Our traditions of free choice, free enterprise and free speech prohibit restricting expression or advocacy to such state-controlled channels.

In sum, a defendant's Sixth Amendment rights may be exercised in one of three ways—he may choose a private counsel, the court may appoint an attorney for him, or he may decline counsel and represent himself. Of the three, the first is the primary method; it is the one envisioned by the Framers of the Sixth Amendment and the one with the longest history of constitutional recognition. Moreover, of the

three, it is the preferred method; neither appointed counsel nor self-representation conform as closely to our model of the adversary system, see Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."), nor do they effectuate as well the goals of promoting accuracy, fairness, and public acceptance of the criminal justice process that the Sixth Amendment seeks to serve.

## C. Deprivation of the Right to Counsel of Choice Requires Compelling Justification

The discussion above demonstrates that the right to counsel of choice is a fundamental right. It cannot be denied without compelling justification. <u>United States</u>

v. Monsanto, 852 F.2d 1400, 1402 (2d Cir. 1988) (Chief Judge Feinberg, writing

for himself and Judges Oakes and Kearse).

It is no answer that a defendant denied this right may receive appointed counsel conforming to the "effective assistance of counsel" standard. Moreover, the fact that the right to choose counsel is available only to those with sufficient resources to exercise the right does not justify the Government depriving the defendant of the resources that he would otherwise possess and that are ample to exercise the right. United States v. Unit No. 7 and Unit No. 8 (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988). Virtually all constitutional rights cost money to exercise. The right to free speech is dependent upon the individual's having sufficient resources to reach his audience. A listener's First Amendment right to receive ideas is similarly dependent upon his ability to travel to a demonstration, purchase a book, pamphlet or newspaper, or own a television.

A pregnant woman's right to choose an abortion is contingent on her having the resources to afford one. Even the free exercise of religion usually costs money. Where independent of governmental action, an individual lacks the resources to exercise these fundamental rights, the absence of state action will ordinarily preclude his assertion of a constitutional claim. On the other hand, where the individual would otherwise have sufficient resources to exercise the right, but Government acts in some way to take away those resources, the governmental action in question must be justified. Kiser, 853 F.2d at 1450-51.

Few constitutional rights, including the right to counsel of choice, are absolute. See Wheat v. United States, 486 U.S. ---, 108 S. Ct. 1692, 1697, 100 L.Ed. 2d 140, 148-49 (1988) ("The Sixth Amendment right to choose one's own counsel

is circumscribed in several important respects."). Fundamental rights like the First Amendment must yield to governmental regulation advancing a "compelling state interest." See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (First Amendment right to free exercise of religion). Thus, it is no answer that the defendant after forfeiture is left without sufficient assets to retain counsel of choice; rather, the question is whether the Government's freezing or seizing of his assets can be justified when balanced against the significant individual and societal interests underlying the constitutional right to counsel of choice.

In striking this balance a standard of "heightened scrutiny," demanding compelling necessity to outweigh the right to counsel of choice, is appropriate. What is at stake here is no mere regulation of the right or postponement of its exercise, for -

which lesser scrutiny may suffice. Rather, what is involved is the wholesale abridgment of the right to counsel of choice. When a defendant is stripped of all his assets, his right to retain counsel of choice is not only postponed or its exercise limited by the need to accommodate the demands of the administration of justice; his ability to exercise the right is totally abridged.

For such a total abridgment to be upheld, the most compelling of justifications is required. The assertion of an important or significant governmental interest cannot alone suffice. This is the teaching of <a href="#Faretta">Faretta</a>, which recognized that the Sixth Amendment right of self-representation outweighs a number of significant interests that argue against it—the interest in judicial economy and efficiency that would be furthered by requiring counsel rather than permitting an uncounseled

defendant to conduct the defense, and the societal interests in accuracy in adjudication and the appearance of fairness which inevitably suffer when there is a strong imbalance in the adversary system such as results when an uncounseled defendant alone faces a professional prosecutor. Faretta resolves the conflict between these significant interests and the defendant's Sixth Amendment right in favor of the Sixth Amendment right to self-representation which, like the right to counsel of choice involved here, was at risk of being totally abridged. See Rankin, 779 F.2d at 961; Mirtzes, 761 F.2d at 286.

This Court's recent distinction of the right of self-representation protected in <a href="#Faretta">Faretta</a> from the right to choose a particular counsel does not call into question the propriety of applying the strict scrutiny approach of <a href="#Faretta">Faretta</a> where, as here, a wholesale abridgement of the right to

choose <u>any</u> counsel is at issue. In a footnote in <u>Wheat</u>, 108 S. Ct. at 1697 n.3, the Court stated: "Our holding in <u>Faretta</u> that a criminal defendant has a Sixth Amendment right to represent <u>himself</u> if he voluntarily elects to do so does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." (Emphasis in original.)

"encompass" the distinct issue presented in <a href="Wheat">Wheat</a> is, of course, not surprising. <a href="Faretta">Faretta</a> did not deal at all with the right to counsel of choice, but only with the separate question of whether a defendant could waive counsel and represent himself. As a result, its holding unquestionably cannot be said to "encompass" the counsel of choice issue presented in <a href="Wheat">Wheat</a>. For the same reason, the Court's holding in <a href="Wheat">Wheat</a>—that a defendant could not choose

representation by an attorney found to be subject to an actual conflict of interest—does not "encompass" the discrete question of whether the Government may deprive a defendant of the opportunity to select any private counsel, including all private practitioners not subject to disqualifying conditions such as conflicts of interest.

Although neither the holding of Faretta nor that of Wheat "encompasses" this separate question, the approach of Faretta rather than that of Wheat is appropriate to its resolution. In both this context and that of Faretta, denial of the defendant's contention would totally destroy the right in question -- selfrepresentation in Faretta and representation by some private counsel of choice By contrast, rejection of the defendant's desire in Wheat, to be represented by a particular counsel found to labor under an actual conflict of interest,

still preserves the defendant's opportunity to be represented by a counsel of choice, albeit not his first choice.

Wheat is thus a case involving necessary and reasonable regulation of the exercise of the right to counsel of choice, rather than its total abridgment. question raised by the forfeiture statutes is not whether exercise of the right to counsel of choice can be regulated, such as by restrictions on the choice of a counsel who is otherwise occupied in order to prevent undue delay, or on the choice of attorneys disqualified by factors such as the conflict of interest in Wheat. Rather, it is whether the right may be totally destroyed by governmental action that renders the defendant completely unable to choose any private counsel. The balance struck in Wheat between the need to preserve the appearance of fairness in the criminal process and to ensure that trials

are conducted within the ethical standards of the profession, on the one hand, and the defendant's interest in choosing a particular counsel, on the other, 108 S. Ct. at 1697-98, concededly comes at the expense of values underlying the right to counsel of choice. But the effect on these values resulting from requiring the defendant to appear through his second choice of attorneys rather than his first must be regarded as marginal. There is a vast difference, however, between overriding a defendant's choice of a particular lawyer and preventing him from employing any lawyer at all. The latter would subvert many important values underlying the Sixth Amendment -diminishing the potential for trust and confidence that are essential to a meaningful attorney-client relationship, depreciating respect for individual choice and autonomy that serve as a basic premise of the right, undermining the defendant's

sense of participation in the proceeding, thereby diminishing its appearance of fairness and his ability to accept its outcome, prohibiting the exercise of free expression through private advocates, and ultimately jeopardizing public confidence in the administration of justice. As a result, the balancing approach employed in Wheat for measuring the effect of the minor regulation on the exercise of the Sixth Amendment right should be rejected here in favor of the more stringent scrutiny of Faretta.

A number of other Supreme Court cases apply the approach taken in <u>Faretta</u> to resolve conflicts between various significant governmental interests and the Sixth Amendment. These cases come out in favor of the Sixth Amendment. In <u>Massiah v. United States</u>, 377 U.S. 201 (1964), <u>United States v. Henry</u>, 447 U.S. 264 (1980), and <u>Maine v. Moulton</u>, 474 U.S. 159 (1985), the

Court found the Sixth Amendment violated when, after adversary proceedings had begun, the state used an undercover agent or informant to obtain inculpatory statements in the absence of counsel. though the prosecution had urged that the gathering of such evidence was necessitated by the police "interest in the thorough investigation" of both indicted crimes as well as new ones, Moulton, 474 U.S. at 179, the Court rejected this plainly significant interest, holding that "the Government's investigative powers are limited by the Sixth Amendment rights of the accused." Id. In other words, so strong is the Sixth Amendment that a routine and valuable investigative technique just could not be employed during that crucial period during which a citizen is guaranteed the assistance of counsel.

Geders v. United States, 425 U.S. 80 (1976), also supports application of

strict scrutiny to the abridgment of the right to counsel of choice. In Geders, the prosecution's concededly important interest in preventing the "improper influence on testimony or 'coaching' of a witness," id. at 89, and the needs of the proper administration of justice to allow the trial judge to exercise "substantial control over the proceedings," id. at 87, could not outweigh the defendant's right to consult counsel during an overnight recess in the trial. The conflict between these significant governmental interests and the right to counsel of the defendant "must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." Id. at 91. See also Brooks v. Tennessee, 406 U.S. 605 (1972). Because the Court found that "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of" the practice

followed, <u>id</u>. at 89, that practice violated the Sixth Amendment.

Here we have not merely the 17-hour "barrier between client and counsel" involved in <u>Geders</u>, 425 U.S. at 89, but a total barrier between the defendant and his counsel of choice. Unless that total barrier can be justified by the most compelling of governmental ends and the absence of alternative means of achieving them, this total abridgment of the right to counsel of choice may not be sanctioned.

Strict scrutiny here is also demanded by First Amendment principles, which in the context of the right to use counsel to assert legal rights overlap with those of the Sixth Amendment. Use of the forfeiture statutes to disqualify a defendant's chosen counsel and render unavailable all but public defenders picked and paid for by the Sovereign destroys important First as well

as Sixth Amendment rights, and must meet the "exacting scrutiny" traditionally applied in the First Amendment area. E.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Elrod v. Burns, 427 U.S. 347, 362 (1976). Moreover, the total abridgment of the right to counsel of choice accomplished by an order restraining the defendant's use of his assets to hire any attorney is a form of prior restraint, and as such bears "a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

D. The Governmental Interests
Underlying the Forfeiture
Statutes Do Not Justify
Deprivation of the Right to
Counsel of Choice Through
Forfeiture of Legitimate
Attorneys' Fees

These Sixth Amendment cases (<u>Faretta</u>, <u>Massiah</u>, <u>Henry</u>, <u>Moulton</u>, and <u>Geders</u>) and the First Amendment cases support the view

that the burden of justification required for this total abridgment of the right to counsel of choice should be framed in terms of the usual test of "strict scrutiny" invoked when fundamental constitutional rights are violated, requiring a "compelling governmental interest" and the use of "least restrictive means." See, e.g., Elrod v. Burns, supra (First Amendment right to freedom of expression); Wisconsin v. Yoder, supra (First Amendment right to free exercise of religion); Roe v. Wade, 410 U.S. 113 (1973) (substantive due process right to abortion). But whether the right is viewed as one requiring strict scrutiny or as a right to be free of "unnecessary or arbitrary" interference in the selection of retained counsel, as several of the circuit courts have stated, see, e.g., In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick), 781 F.2d 238, 250 (2d Cir. 1985) (en banc), cert. denied,

475 U.S. 1108 (1986), the standard cannot be met here.

The cases dealing with the right to counsel of choice usually involve questions of continuances to enable the defendant to retain counsel or to substitute new counsel, or to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court. See Wheat, 108 S. Ct. at 1697-99; Morris v. Slappy, 461 U.S. 1, 11-12 (1984); Leis v. Flynt, 439 U.S. 438 (1979). In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick), 781 F.2d 238, 250-51 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986) (citing cases). These involve regulations on exercise of the right, not its total abridgment. Yet even in these contexts the circuit courts have protected the right to counsel of choice from any

"unnecessary or arbitrary" interference, holding that it will give way only when required by the "fair and proper administration of justice." See, e.g., Slotnick, supra, at 250 (quoting United States v. Ostrer, 597 F.2d 337, 341 (2d Cir. 1979)); United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987) (the right "cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice"); United States v. Rankin, 779 F.2d 956, 958 (3d Cir. 1986) (the right "may not be hindered unnecessarily"); United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir.) ("in general, defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice."), cert. denied, 479 U.S. 994 (1985); Linton v. Perini, 656 F.2d 207, 211 (6th Cir. 1981) (defendant may not be denied the right

"arbitrarily and without adequate reason"), cert. denied, 454 U.S. 1162 (1982); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (the "arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel").

Unlike these trial-related instances of balancing the defendant's right to counsel of choice against the demands of the efficient administration of justice, our cases involve governmental action to strip a defendant of all his assets, thereby totally precluding his ability to retain any counsel. If anything, therefore, a higher level of scrutiny should be applied. Plainly, if Congress were to pass a statute depriving all RICO or drug felony defendants of the right to counsel of choice, that statute would be subjected to strict scrutiny and found unconstitutional. Can the same result be achieved by indirection?

The Government's interests underlying the forfeiture statutes do not justify deprivation of counsel of choice. opening briefs of the parties and other amici curiae correctly identify these interests. Foremost is prevention of "sham" or "fraudulent" transactions improperly transferring assets to "nominees" not operating at "arms' length" with the defendant, in order to evade forfeiture. Ultimately, if the defendant is found guilty, the statutes serve to punish and deter by stripping the defendant of any ill-gotten gains and removing any illicit resources from future use in crime. All of these interests are, as a practical matter, accommodated when the accused must part with his assets to pay legitimate attorneys' fees to defense counsel.

Thus, marginal at best is the Government's legitimate interest in using the forfeiture statutes to freeze or seize

assets which the accused needs in order to defend against the forfeiture charges. But the cost is exorbitant, for it forfeits the rights of the innocent and the guilty alike in order to make sure that the guilty one does not enjoy the small pleasure of having his or her own chosen counsel during the travail. Moreover, the prosecution's deployment of the forfeiture statutes to preclude hiring private counsel tramples upon a host of other values that are fundamental to our Country. Forfeiture of legitimate attorneys' fees is thus an arbitrary and unreasonable intrusion on the defendant's right to counsel of choice and should be held unconstitutional.

On any fair balance, the right to counsel of choice powerfully outweighs the need to prevent the accused from enjoying that right. In final analysis the Government would sacrifice our very history and traditions in order to put a few more

dollars into the federal treasury, like Esau trading his birthright to Jacob for a mess of pottage. See Genesis 25: 29-34.

- II. THE FORFEITURE STATUTES DO NOT COVER LEGITIMATE ATTORNEYS' FEES AND SHOULD NOT BE CONSTRUED TO DO SO; IN THE ALTERNATIVE, THE BROAD ASSERTION OF PROSECUTORIAL POWER TO IMPEDE THE ATTORNEY-CLIENT RELATIONSHIP AND IMPAIR THE ADVERSARY SYSTEM THROUGH UNFETTERED DISCRETION TO INVOKE THE FORFEITURE PROVISIONS AGAINST ATTORNEYS' FEES SHOULD BE DEEMED ULTRA VIRES
- A. The Statutes Should Be Construed Not to Cover Legitimate Attorneys' Fees

As we have contended in Point I, application of the forfeiture statute to legitimate attorneys' fees violates the Sixth Amendment right to counsel of choice. At the very least, such application raises an extremely serious constitutional question. Need this difficult constitutional question be resolved by this Court?

It is a cardinal principle of statutory construction that, where possible, statutes should be construed to avoid an unconstitutional interpretation. See, e.g., Lowe v. S.E.C., 472 U.S. 181, 190 (1985); Gutknecht v. United States, 396 U.S. 295 (1970); Machinists v. Street, 367 U.S. 740, 749-50 (1961); Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Indeed, the Court has on occasion invoked canon of this statutory construction with special force where the application of the statute in question would raise "serious constitutional problems." DeBartolo Corp. v. Florida Gulf Coast Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979).

N.L.R.B. v. Catholic Bishop of Chicago, is highly instructive. The issue in Catholic

Bishop concerned whether the jurisdiction of the National Labor Relations Act extended to teachers in church-operated schools who taught both religious and secular subjects. The statutory definition of "employer" was exceedingly broad, covering "any person acting as an agent of an employer, directly or indirectly," with eight specified exceptions that did not include church-related organizations of any kind. 29 U.S.C. § 152(2); see 440 U.S. at 511 (dissenting opinion of Brennan, J., joined by White, Marshall & Blackmun, J.J.). The Court had previously read the statute as evincing Congress' intent to "vest in the [National Labor Relations] Board the fullest jurisdictional breadth statutorily permissible under the Commerce Clause," N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (emphasis in original), holding employers within the reach of Congress' interstate commerce

power to be covered regardless of the nature of their activity. The Court was worried, however, that applying the statute to church-operated schools would present "a significant risk that the First Amendment [free exercise clause] will be infringed."

440 U.S. at 502; id. at 501-04.

Given this serious constitutional concern, the Court took special care to avoid the constitutional question through statutory construction. Citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), and paraphrasing Chief Justice Marshall, the Court noted that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 440 U.S. at 500. When "serious constitutional questions" would be raised by application of a statute, as the Court found the First Amendment free exercise questions before it to be, the Court defined its mandate as

follows: "we must first identify 'the affirmative intentions of the Congress clearly expressed' before concluding that the Act" applies. 440 U.S. at 500. Accord, DeBartolo Corp., 108 S. Ct. at 1398 (describing the Catholic Bishop approach as the "traditional rule"). Applying this approach, the Court, although admitting that Congress used "very broad terms" in defining the Board's jurisdiction over "employers," 440 U.S. at 504, could nevertheless find "no clear expression" in either the explicit language of the statute or its legislative history "of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Id. Based on the language of the statute and its legislative history, the Court found that there was "nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction" and "that Congress

simply gave no consideration to churchoperated schools." Id. at 504-05. The
Court concluded that "in the absence of a
clear expression of Congressional intent
to bring teachers in church-operated
schools within the juri diction of the
Board, we decline to construe the Act in a
manner that could in turn call upon the
Court to resolve difficult and sensitive
questions arising out of the guarantees of
the First Amendment Religion Clauses." Id.
at 507.

The "traditional rule followed in Catholic Bishop," see DeBartolo Corp., 108 S. Ct. at 1398, should be applied in construing the forfeiture statutes in view of the "serious constitutional questions" that their application to attorneys' fees raises under the Sixth (and First) Amendments. Applying this approach leads to a similar result as reached in Catholic Bishop. In order to avoid the serious

constitutional difficulties presented by application of the statutes to bona fide attorneys' fees, the forfeiture statutes should be read as applicable only to sham and fraudulent attorneys' fees, and not to legitimate fees that are the product of arms' length arrangements. Several district court opinions have reached this conclusion even without benefit of the Catholic Bishop approach, and we commend them to the Court. See, e.g., United States v. Truglio, 660 F. Supp. 103 (N.D. W.Va. 1987); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986), aff'd on other grounds sub nom. United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986), rev'd on this ground but aff'd on other grounds sub nom. United States v.

Harvey, 814 F.2d 905, 913-18 (4th Cir. 1987); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); see also Monsanto, 852 F.2d at 1405-11 (concurring opinion of Winters, J., joined by Meskill & Newman, J.J.). Contra United States v. Harvey, 814 F.2d 905, 913-18 (4th Cir. 1987), aff'd on this ground but rev'd on other grounds sub nom. In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 641-43 (4th Cir. 1988) (en banc); United States v. Nichols, 841 F.2d 1485, 1491-96 (10th Cir. 1988).

The plain language of the criminal forfeiture statutes does not explicitly provide that attorneys' fees are forfeitble; it provides only for the forfeiture of "any property" obtained as a result of the crime. See 18 U.S.C. §§ 1963(a)(3); 21 U.S.C. §§ 853(a)(1).\* "Property" is

<sup>\*</sup>The criminal forfeiture statutes also reach (Footnote continued on following page)

broadly defined to include "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b); 21 U.S.C. \$ 853(b). While Congress thus defined the "property" subject to forfeiture in very broad terms, there is no indication in the language of the statute that attorneys' fees were deemed to be covered. Under the approach taken in Catholic Bishop, the broad statutory definition of "property" does not, without a strong manifestation of intent in the legislative history, constitute the

<sup>(</sup>Footnote continued from preceeding page)

<sup>&</sup>quot;any interest the person has acquired or maintained in violation of" RICO, 18 U.S.C. § 1963(a) (1); "any . . . property" used to facilitate commission of a felony drug law violation, 21 U.S.C. § 853(a)(2); and "any . . . interest in" and "any . . . property . . . affording a source of influence over" a criminal enterprise. See 18 U.S.C. 1963(a)(2); 21 U.S.C. § 853(a)(3).

"clear expression of an affirmative intention of Congress," 440 U.S. at 504, necessary to find the statutes applicable to bona fide attorneys' fees.

The statute construed in Catholic Bishop had a very broad provision defining basic coverage and numerous special exceptions. Yet the Court, in effect, carved out another exception for teachers in church schools. The CFA of 1984 has a broad forfeiture provision reaching "any property" and exemptions for owners of superior title and bona fide purchasers. It would be perfectly proper under Catholic Bishop to carve out a further exemption for legitimate attorneys' fees in order to protect the Sixth Amendment. However, it may not be necessary to go that far because of the language employed in the existing provision setting up the exemptions. Let us explain.

B. The Statutes Expressly Direct that Purchasers Be Treated "Reasonably"

The criminal forfeiture statutes provide for a post-conviction hearing at which third parties may challenge a forfeiture judgment concerning property transferred to them, see 18 U.S.C. § 1963 (1), 21 U.S.C. § 853(n), but again do not refer to attorneys' fees. Moreover, the plain language of these provisions leaves ample room for exempting legitimate attorneys' fees from forfeiture.

The Government has insisted in fee forfeiture litigation that the plain language of the statutes covers attorneys' fees because of its general inclusiveness and because the only conceivable statutory exception to forfeiture in these cases is the provision for bona fide purchasers, 18 U.S.C. §§ 1963(c) and 1963(1)(6)(B); 21 U.S.C. §§ 853(c) and 853(n)(6)(B), which attorneys cannot meet. But the Government

overlooks key language of the statutes it relies upon.

Under the CFA a petitioner seeking to amend an order of forfeiture to exempt transferred property therefrom must establish that:

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

18 U.S.C. § 1963(1)(6)(B) (emphasis added);

see also 21 U.S.C. § 853(n)(6)(B). Congress added the underlined language to define the bona fide purchaser ("bfp") exemption it was creating. The added language suggests that purchasers with some cause to believe the property was subject to forfeiture may nonetheless be entitled to relief from forfeiture. Moreover, careful scrutiny of the actual language chosen and comparison with the definitions

of bona fide purchaser used in other statutes reveals a fairly generous exemption.

Congress did not speak of persons who were "without reason to believe" that the property was subject to forfeiture. Compare 18 U.S.C. § 3668(b) ("that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws"); 15 U.S.C. § 714p ("did not know or have reason to know"). It did not even speak of persons who were "without reasonable cause to believe" the property might be forfeited. Cf. 28 U.S.C. § 2465 (existence of "reasonable cause" for a seizure disentitles victorious claimant of property from award of costs, and confers immunity upon the prosecutor and upon the persons who made the seizure). Instead Congress exempted persons who were "reasonably without cause to believe" that the property might be forfeited.

Let us take a formal look at the precise wording of the statute. As a matter of grammar and logic, the word "reasonably" is unnecessary unless it ameliorates the "without cause to believe" phrase that follows it. Furthermore, the choice to locate this "reasonableness" modifier at the beginning of the phrase rather than later as a descriptor of the quantum of "cause" needed to defeat the purchaser's claim (e.g., "without cause reasonably to believe"), tells us that the modifier has a larger purpose than to serve as some standard of proof. The purpose is to introduce a rule of reason into the entire question of forfeiting the interests of those who acquire the defendant's property in good faith.

Further, as a matter of lexicology the term "reasonably" connotes: conduct bounded by reason, e.g., acting in a reasonable manner; a condition which

exists moderately; a proposition which is somewhat or fairly sufficiently true; or that which is rational and sensible, is governed by logic or justice, or is subject to a rule of reason. See II The Compact Edition of the Oxford English Dictionary 2432 (1971); Webster's Third New International Dictionary 1892 (unabridged ed. 1981); The Random House Dictionary of the English Language 1608 (2d ed. unabridged 1987); WordFinder Dictionary Thesaurus\* The first definition of (Model WF-220). "reasonably" set forth in the Oxford English Dictionary is "1. According to reason, with good reason, justly, properly." Supra. All these shades of meaning carry the idea of flexibility which the Government insists is lacking from the statutory scheme.

From this perspective and as a matter

<sup>\*</sup>An electronic dictionary-thesaurus compiled for Xerox Corporation and Microlytics, Inc.

of common sense, when Congress exempted persons who were "reasonably without cause to believe" that property might be forfeited it included those persons (such as defense lawyers) whose basis to believe that the property was subject to forfeiture does not amount to reasonable cause for a court to visit the hardship of forfeiture upon them. As Chief Judge Clark of the Fifth Circuit put it, "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services." United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), modified on other grounds, 809 F.2d 249 (5th Cir. 1987).

In short, the plain language of the statute supports our view. It is <u>unreason-able</u> and unjust to forfeit property needed to pay legitimate attorneys' fees merely

because of what the lawyers need to know in order to do their job properly. But, at worst, this statutory language is ambiguous\* and authorizes consideration of what we believe is plain legislative history also supporting our contention.

where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.

Sen. Rep. No. 225, 98th Cong., 1st Sess. 209 (1983), 1984 U.S. Code Cong. & Admin. News 3182, 3392. This report does not elaborate what the Congress meant by its "reasonably without cause to believe" wording of the bfp provision. Moreover, the report does stress the basic purpose of the 1984 amendment to prevent sham transfers to nominees. Id. n.47. So the statutory language used remains supportive or, at least, ambiguous—and in either event fairly amenable to the interpretation we urge.

<sup>\*</sup>We recognize that the Senate Report briefly describes the bfp exemption by paraphrasing it in more traditional syntax than the language actually employed by the Congress:

C. The Legislative History Evinces No Affirmative Intention, Clearly Expressed, to Interfere with Sixth Amendment Rights

If the forfeiture provisions are ambiguous or, at the least, lack clarity, they absolutely must be construed to avoid constitutional problems. And, in this regard, the statutes certainly cannot be said to evince "the affirmative intention of the Congress clearly expressed," Catholic Bishop, 440 U.S. at 501, that attorneys' fees were covered.

In addition, they must be viewed through the lens of the "rule of lenity". The rule of lenity is as appropriate in the forfeiture context, see United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); United States v. \$38,000.000 in U.S. Currency, 816 F.2d 1538, 1547 (11th

Cir. 1987)(same); United States v. One 1976

Ford F-150 Pick-Up Vin F144UB03797, 769

F.2d 525, 527 (8th Cir. 1985) (same), as it is in that of the criminal prohibition.

See, e.g., McNally v. United States, 483

U.S. ---, 107 S.Ct. 2875, 97 L.Ed. 2d 292,

302 (1987); Bifulco v. United States, 447

U.S. 381, 387 (1980).\*

Because of the lack of clarity in the statutes and the serious constitutional difficulties raised by construing them to cover legitimate attorneys' fees, it is

<sup>\*</sup>We do not believe that the liberal construction clause contained in the CFA, 21 U.S.C. § 853(o), and in the RICO law ("The provisions of this section shall be liberally construed to effectuate its remedial purposes."), see Russello v. United States, 464 U.S. 16, 27 (1983), can cure the ambiguity here. As the Eighth Circuit has found, "[t]he extent of judicial deference" owed such a clause "stands unclear" in view of the countervailing force of the constitutionally based rule of lenity. United States v. Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). In any case, as we have contended, the "remedial" purpose of the forfeiture provisions can be fully effectuated without construing them to apply to legitimate attorneys' fees. See United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

appropriate to look at the legislative history to determine whether it can provide the needed "affirmative intention . . . clearly expressed." 440 U.S. at 501, 504. See also 2A Sutherland, Statutory Construction § 48.01 (4th ed. 1973); Russello v. United States, 464 U.S. 16, 20 (1983) (a "clearly expressed legislative intent to the contrary" may justify disregarding even unambiguous statutory language); United States v. American Trucking Ass'ns, 310 U.S. 537, 540 (1940) (when plain meaning of a statute has lead to "absurd or futile results" or to "an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.").

Congress, in enacting CFA, intended to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of

third-party transfers prior to conviction. See S. Rep., No. 225, 98th Cong., 1st Sess. 200-01 (1983), 1984 U.S. Code Cong. & Admin. News at 3182, 3383-84. The district court opinions construing the statute not to reach legitimate attorneys' fees concluded that Congress only intended the forfeiture provisions to reach fraudulent third-party transfers, such as "sham" attorneys' fees. See cases cited, supra. The legislative history demonstrates that Congress did not contemplate the application of the statute to legitimate as opposed to fraudulent attorneys' fees. A footnote in a House Report accompanying an earlier draft of the 1984 amendments states that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. No. 845, Part I, 98th Cong., 2d Sess. 19 n.1 (1984). This footnote, in its next sentence, states that "[t]he Committee,

therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." Id. Although some courts have construed this sentence to mean that Congress "simply left the question for the courts," United States v. Nichols, 841 F.2d 1485, 1496 (10th Cir. 1988), a proper reading of the two sentences, in sequence, demonstrates that Congress did not contemplate application of the forfeiture statute to legitimate attorneys' fees. In view of the clear disclaimer in the first sentence that the statute not be read "to interfere with a person's Sixth Amendment right to counsel," it would be unnecessary to resolve the conflict in the district courts concerning the constitutionality of the statute because Congress did not contemplate that the statute would be applied in this way, i.e., Congress expected the

statute to be applied only to sham fees. To apply it to legitimate fees would at least potentially interfere with the right of counsel, which Congress stated it did not intend to do. The use of the word "therefore" in the second sentence makes it plain that Congress was not merely announcing that it was leaving the constitutional question to the courts. The word "therefore" refers back to the first sentence and links Congress' statement that it would not resolve the question with its earlier expressed intent not to interfere with Sixth Amendment rights. Because of this expressed intention it "therefore" would be unnecessary to resolve the question.

The Senate report, in discussing the bona fide purchaser exception to for-feiture, states that "[t]he provision is to be construed to deny relief to third parties acting as nominees of the defendant

or who have knowingly engaged in sham or fraudulent transactions." S. Rep., supra, at 209 n.47, 1984 U.S. Code Cong. & Admin. News at 3392 n.47. The same Senate Report states that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions." S. Rep., supra, at 200-01, 1984 U.S. Code Cong. & Admin. News at 3384. A Senate report declaring the "purpose" of a legislative provision and directing how it "is to be construed" should not casually be interpreted to authorize greater mischief than required by the purpose. This is even truer when the House report declares what is not "intended"--interference with Sixth Amendment rights. Hence, the legislative history plainly supports our view.

In any event, the legislative history fails to demonstrate a "clear expression of an affirmative intention of Congress," Catholic Bishop, 440 U.S. at 504, to subject bona fide attorneys' fees to forfeiture. The fairest conclusion may be "that Congress simply gave no consideration," id., to the application of these provisions to legitimate as opposed to sham attorneys' fees,\* and certainly had no intention of interfering with defendants' Sixth Amendment rights. Indeed, this was conceded even by the Tenth Circuit Court of Appeals in its opinion in Nichols, 841

<sup>\*</sup>Although the Senate Report cited with approval a pre-1984 amendment case holding that some of a defendant's property was forfeitable even though it was transferred to his attorney prior to conviction, S. Rep., <a href="supra">supra</a>, at 200 n.28, 1984 U.S. Code Cong. & Admin. News at 3383 n.28 (citing United States v. Long, 654 F.2d 911 (3d Cir. 1981)), "the facts in this case suggest that the transfer was part of a sham." Note, <a href="Attorneys">Attorneys</a>' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys, 62 Notre Dame L. Rev. 734, 741 n.72 (1987).

F.2d at 1496 n.6, which rejected the contention that the statutes should be construed not to cover legitimate attorneys' fees. After an independent "review" of the hearings and the rest of the legislative history, the court could find "only a few oblique references to payments of attorneys," and concluded that "[n]one of these passages indicates that Congress specifically considered whether payments made to attorneys should be subject to forfeiture." Id.\* To avoid

(Footnote continued on following page)

<sup>\*</sup>Where the majority of the panel went wrong in Nichols was in failing to recognize the natural reconciliation between the Government's interest in bringing about forfeiture and the defendant's interest in having the property go to a defense lawyer. (See Point I. D, supra.) In addition, the majority turned logic upside down when it read the Victims of Crime Act of 1984 (now codified at 18 U.S.C. § 3681) to support an inference that when Congress wanted to exempt attorneys' fees, it said so explicitly. 841 F.2d at 1496. The act demonstrates that when Congress wanted to authorize forfeiture of property that might be needed for attorneys' fees, it dealt explicitly with the problem. Moreover, the majority overlooked a critical amendment to the final law passed. The proposed bill would have allowed the regulating of crime publicizing

the difficult Sixth Amendment problems that would otherwise result, the statute should accordingly be construed not to reach legitimate attorneys' fees, but to apply only to those that are sham or fraudulent transfers.

Assertion of Unfettered Prosecutorial Discretion to Interfere with the Attorney-Client Relationship, Impinge on the Right to Counsel of Choice, and Impair the Adversary System Should Be Rejected as <u>Ultra Vires</u> the Statute

Whatever can be said about the language and the legislative history of the 1984 amendments, it is "clear that Congress

<sup>(</sup>Footnote continued from preceding page)

profits to apply "at any stage of the criminal proceedings" 130 Cong. Rec. S10,542 (daily ed. Aug. 10, 1984). The statute as passed two months and two days later applied only "after conviction," 18 U.S.C. § 3681(a); see id., § 3681(c)(1)(B)(ii)—thus manifesting a clear Congressional intent to avoid interfering with Sixth Amendment rights.

did not consider the potential impact that the new forfeiture provisions would have upon attorneys . . . " Committee on Criminal Advocacy, The Forfeiture of Attorneys' Fees in Criminal Cases: A Call for Immediate Remedial Action, 41 The Record of the Association of the Bar of the City of New York 469, 477 (1986). Plainly, there is no indication that Congress in any way intended to cede to the prosecutor the extraordinary authority to eliminate chosen defense counsel and profoundly alter the adversary system by the simple expedient of adding forfeiture claims to its prosecutorial assault.

Forfeiture of attorneys' fees represents a grave threat to our adversary system of justice. Cloud, <u>Forfeiting</u>

<u>Defense Attorneys' Fees: Applying an</u>

<u>Institutional Role Theory to Define Individual Constitutional Rights</u>, 1987 Wis. L.

Rev., 1, 56; Note, <u>Against Forfeiture of</u>

Attorneys' Fees Under RICO: Protecting the Constitutional Right of Criminal Defendants, 61 N.Y.U. L. Rev. 124 (1986). The unfettered discretion asserted for prosecutors under the Government's interpretation of the statute creates a serious potential for prosecutorial abuse:

Because almost any indictment that charges felony violation of federal law can be transformed into a RICO indictment, the government can gain the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses merely by appending a forfeiture indictment." The defendant who had already retained counsel would risk losing her upon disclosure that the prosecution intended to seek forfeiture of attorneys' fees; if the defendant had yet to retain counsel, the prosecutor would have the tools to make it extremely difficult for him to do so. In short, the government would have the power both to prevent a particular attorney from representing a given defendant, and to prevent a defendant from retaining any private counsel at all . . . .

Note, 61 N.Y.U. L. Rev., <u>supra</u>, at 147-48 (footnotes omitted). See also Note,

Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?, 39 Stan. L. Rev. 663 (1987); Committee on Criminal Advocacy, supra, at 484 ("if the government wishes to exclude a lawyer from a particular case, it need only allege a RICO violation, add a forfeiture section to the indictment, and then inform the defendant's lawyer that it will seek forfeiture of his legal fees in the event of a conviction. Such unfettered power would strike at the heart of the adversary system."); Thier, 801 F.2d at 1476 (Rubin, J., concurring) ("The tool of the restraining order, thus put into the hands of the prosecution, gives the Government power to exclude vigorous and specialized defense counsel.").

Under the construction of the forfeiture statute urged by the Government, the prosecutor would enjoy awesome power to

affect the balance between the accused and the Sovereign in the criminal process. See Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser"); Cloud, 1987 Wis. L. Rev., supra. The unfettered power to disqualify the defendant's selected champion and render unavailable representation by any private counsel, relegating the defendant to an attorney selected, trained, supervised, and paid for by the very government that seeks to deprive him of his liberty, cuts strongly against the grain of our adversary system and our basic concepts of fairness. To lodge such unfettered power in the hands of any governmental authority would raise troubling questions. When such wide power to tamper with the adversary process is placed in the hands of one of the adversaries in the contest--the prosecutor--the resulting potential for abuse is simply too

great. Cf. Tumey v. Ohio, 273 U.S. 510 (1927) (pecuniary interest of judge in outcome of proceedings results in per se bias reversible even without a showing that the bias affected the judge's conduct). The actual abuse is even greater, of course, when the legislation is applied across the board rather than selectively. Then it knocks retained counsel out of as many cases as possible, severely undermines the private defense bar and catastrophically overloads the public defender system.

The legislative history discussed above demonstrates that Congress never intended to arm prosecutors with such a lethal weapon.\* In reality, Congress just

<sup>\*</sup>We also doubt that the bfp exemption was actually <u>designed</u> to protect against forfeiture of attorneys' fees, although it may have this effect. This provision purports to operate only after the trial is over. 18 U.S.C. § 1963(i); 21 U.S.C. 853(k). But payment of attorneys' fees is an exceptional kind of transfer which arises out of the necessity to defend and which must ordinarily be resolved prior to trial.

adopted some procedural reforms of forfeiture law recommended by the Department of Justice, part of the massive Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1837, passed on October 12, 1984, and adjourned for the fall elections. Subsequent legislative history also demonstrates that Congress did not intend to authorize the Department of Justice to interfere with Sixth Amendment rights. See Brief for Respondent (Peter Monsanto) in Case No. 88-454; Brief Amicus Curiae of the American Bar Association in Support of the Peititioner Caplin & Drysdale in No. 87-1729 and the Respondent Monsanto in No. 88-454, at p. 10. Thus, we must ask whether this general legislative language can support such a broad assertion of prosecutorial discretion, impinging so heavily on individual liberties and altering so dramatically the nature of our adversary system? Substantial precedent prohibits

reading general statutory language as delegating dangerous power to infringe upon fundamental rights. Courts have demanded an explicit legislative expression of the intention to delegate such authority. E.g., Thompson v. Oklahoma, 487 U.S. ---, ---, 108 S. Ct. 2687, 2706, 101 L.Ed. 2d 702, 728 (1988) (O'Connor, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308-09 (1973) (opinion of Powell, J.); Hampton v. Mow Sun Wong, 426 U.S. 88, 105-14 (1976); Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116, 129 (1958); see J. Freedman, Crisis and Legitimacy 83-85 (1978); B. Schwartz, Administrative Law 47-48 (1976); L. Tribe, American Constitutional Law § 517, at 365-66 (2d ed. 1988); A. Bickel, The Least Dangerous Branch 111-98 (1962); Tribe, The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of

Lawmaking, 10 Creighton L. Rev. 433, 442-43 (1977).

The Brief for the Respondent (Monsanto) in Case No. 88-454 discusses a leading case, Kent v. Dulles, and we agree that the decision there provides a good analogy We also agree that the Fourth here. Circuit majority below in Case No. 87-1729, In re Forfeiture Hearing as -to Caplin & Drysdale, 837 F.2d 637, 648-49 (4th Cir. 1988) (en banc), simply overlooked that the serious problems it saw in the CFA should be solved by holding the application of that legislation to legitimate attorneys' fees to be ultra vires. Then Congress would have the opportunity in the first instance to resolve the profound questions of public policy raised by the Executive Branch's assumption of the authority at issue in these cases. A judicial "remand" to the legislature may be the answer.\*

<sup>\*</sup>We, as <u>amici</u> <u>curiae</u>, also share the view (Footnote continued on following page)

## CONCLUSION

Let us conclude this long brief in short epilogue.

We, the People, cherish the right to counsel and the primary right to choose our own counsel. We disfavor, even eschew, forfeitures. The latter is now encroaching on the former. If the Government's blind expansion of a legal fiction is not stopped, the result will be to take the adversary out of the adversary process. The Sixth Amendment is at stake.

We ask this Court to hold strong for

<sup>(</sup>Footnote continued from preceding page)

that the problems cannot be solved by devising some sort of preliminary mini-trial to determine, for practical purposes, the issues which are only supposed to be decided after a full Sixth Amendment jury trial. See Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae in Support of Respondent (Monsanto), in Case No. 88-454, at pp. 22-23. See also United States v. Monsanto, 836 F.2d 74, 86-87 (2d Cir. 1987) (Oakes, J., dissenting), rev'd, 852 F.2d 1400 (2d Cir. 1988) (en banc). Indeed, we see these cases as governed by substantive Sixth Amendment protection of the right to counsel of choice, for which there is no procedural due process "fix."

Freedom, and affirm the Monsanto court below in its holding that genuine attorneys' fees are exempt from forfeiture under the CFA. And, the Court should reverse the en banc decision in Caplin & Drysdale and reinstate the district court decision allowing reasonable attorneys' fees for legitimate legal services rendered.

Respectfully submitted,

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January 1989

No. 88-454 No. 87-1729 FILED
FEB 3 1989

JOSEPH F. SPANIOL JR.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

UNITED STATES OF AMERICA, Petitioner,

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### PETER MONSANTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPLIN & DRYSDALE, CHARTERED, Petitioner,

V.

#### UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE
IN SUPPORT OF THE UNITED STATES OF AMERICA

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## **OUESTION PRESENTED**

Does the Due Process Clause of the

Fifth Amendment or the right to counsel

guaranteed by the Sixth Amendment to the

United States Constitution require that

property restrained and alleged to be

subject to forfeiture be made available to

a criminal defendant to employ counsel of

choice?

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## INTEREST OF AMICUS CURIAE

With the Comprehensive Crime Control Act of 1984 (Pub.L.No.98-473, 98 Stat. 2040 (1984)), Congress acknowledged state and local law enforcement as fullfledged and vital partners in the national struggle against the scourge of narcotics trafficking. In that act Congress authorized the Attorney General and Commissioner of Customs to transfer to a state or local law enforcement agency forfeited property or the proceeds of a successful forfeiture proceeding in an amount proportionate to the agency's effort leading to the seizure of the asset. (Ch. III, Comprehensive Crime Control Act of 1984, amending 21 U.S.C. \$ 881(e) and 19 U.S.C. § 1616.) Congress renewed this warrant in 1986 (Tit. I, subtit. D, § 1992 Anti-Drug Abuse Act of 1986, amending 21 U.S.C. § 881(e) and 19 U.S.C. § 1616a), and most recently reaffirmed the importance of these "equitable transfers" in the

Anti-Drug Abuse Act of 1988 (Tit. VI, subtit. B, \$ 6077, amending 21 U.S.C. \$ 881(e)).

A state or local agency becomes eligible for an "equitable transfer" of federally forfeited property or proceeds when, acting alone, it makes a seizure which is "adopted" by a federal law enforcement agency (see, United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926)) and subjected to federal forfeiture proceedings (see generally, 19 U.S.C. § 1604 et seq.). Alternatively, a state or local agency may "share" the proceeds of a forfeiture action so as to reflect its contribution when it is involved cooperatively in an investigation with a federal law enforcement agency leading to the seizure and forfeiture of property under federal law. (See, the Attorney General's Guidelines on Seized and Forfeited Property, Federal Register,

Vol. 52, No. 237, Thursday, December 10, 1987, pp. 46855-46862.)

Over the past four years, state and local law enforcement agencies nationally have seized or participated in the seizure of hundreds of millions of dollars of narcotics related assets which have been subjected to federal "administrative" (19 U.S.C. § 1607) and judicial (19 U.S.C. § 1610) forfeiture proceedings (see, United States v. U.S. Currency in Amount of \$2,857.00, 754 F.2d 208 (7th Cir. 1985). This month the Los Angeles Police Department reached the one hundred million dollar (\$100,000,000.00) mark in drug-related seizures measured from 1985. In this period of time property and proceeds worth some two hundred million dollars (\$200,000,000.00) have been transferred (back) to state and local law enforcement agencies as equitable shares of completed

forfeiture actions -- twenty-four million
dollars (\$24,000,000.00) in FY 1986, sixtyseven million dollars (\$67,000,000.00) in
FY 1987, and one hundred four million
(\$104,000,000.00) in FY 1988. (Statistics
provided by the Drug Enforcement
Administration and Federal Bureau of
Investigation and do not include equitable
transfers from Treasury Department
agencies, in particular, the United States
Customs Service.)

These seizures, successful forfeiture actions and "equitable transfers" have a double-barreled impact. First, seizure and forfeiture of narcotics related assets strip drug traffickers of their economic base. (In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 648 (4th Cir. 1988) (en banc), cert. granted, [hereafter cited as Caplin & Drysdale, Chartered]). Second, every dollar equitably transferred to a

state or local agency is, in keeping with
the Attorney General's Guidelines,
allocated exclusively for law enforcement
purposes so as to increase the law
enforcement resources of the agency. Thus,
drug related property, either in kind or in
specie, is taken from and turned against
drug dealers.

California law enforcement agencies have aggressively pursued the seizure and forfeiture of narcotics related assets both in cooperation with federal agencies and in their own investigations. Nearly forty percent (40%) of equitable transfer claims received by federal agencies nationally have been submitted by California law enforcement. To date California agencies have received approximately sixty million dollars (\$60,000,000.00) in equitable transfers and millions more are in process pending forfeiture.

Indeed, the utilization of these procedures has been so vigorous that the federal law enforcement agencies and United States Attorneys in California have been hard pressed to keep pace with the seizures made by state and local agencies. This has resulted in the imposition of minimum value limits by the federal offices as a condition to the acceptance of state and local initiated seizures. Moreover, the Anti-Drug Abuse Act of 1988 amends 21 U.S.C. section 881(e) in a manner which seems to reflect Congress's determination that the states should enact and employ their own forfeiture laws. (An "equitable transfer" will be barred when it would "circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited".

[Tit. VI, subtit. B, § 6077].)

Recognizing the need for an effective state forfeiture mechanism, the

California Legislature modernized the State's narcotics related forfeiture statutes in 1982 and made major revisions in 1986 and again in 1988 in an effort to make these provisions as useful and effective as federal forfeiture law. (Cal. Health & Saf. Code § 11470 et seq.; Stats. 1982, ch. 1289; Stats. 1986, chs. 1032, 1044; Stats. 1988, ch. 1492.) As a result, California now has a civil, in rem narcotics related forfeiture law comparable in most particulars to section 881 of Title 21. These statutes return ninety percent (90%) of forfeited property directly to the seizing agency and prosecutors. (Cal. Health & Saf. Code § 11489.) (Nearly every state has some form of narcotics related forfeiture statute. Thirty states have enacted a version of section 505 of the 1970 Uniform Controlled Substances Act (9 Uniform Laws Annotated 187, 611-614), a civil, in rem forfeiture statute modeled on

section 881.) (<u>Id</u>. at pp. 187-194, <u>id</u>. at
p. 78 (Cum.Sup. 1983).)

The ever increasing resort to asset seizure and forfeiture by law enforcement in California, the consequent burden on federal agencies, and the improvements in the State's statutes have prompted greater reliance on state forfeiture proceedings. This is a trend we expect will continue here and spread to other states.

California, therefore, has a compelling interest in the effective implementation of both federal and its own forfeiture procedures. We believe the fate of both are at stake in these cases. If a defendant has a right to use property subject to forfeiture to pay counsel, the state will be deprived of much of the property seized by its law enforcement agencies which is used to further enhance anti-drug trafficking efforts. At the same

time, the narcotics offender will be able to command high priced legal talent from his criminally acquired or tainted property.

The forfeiture allegations in the indictment underlying the Caplin & Drysdale, Chartered matter, directed against nearly all property interests of the defendant, represent the ultimate reach of existing forfeiture laws. However, that case is not particularly representative. In the vast majority of situations property seized or restrained and otherwise alleged to be subject to forfeiture is composed of discreet, readily identifiable assets which generally have an immediate and obvious connection to illegal activity as proceeds of or property used to facilitate violations of the narcotics laws. The property at stake in Monsanto is closer to the norm. (United States v. Monsanto, 852 F.2d 1400, 1401 (2d Cir.

1988), (en banc), <u>cert. granted.</u>)

Moreover, with rare exceptions, seizures

under California's in rem forfeiture

provisions involve assets worth less than

one hundred thousand dollars (\$100,000.00).

Invariably, it is these seized assets which are looked upon by the criminal defendant as the preferred and primary source of paying counsel. The reasons are rather obvious.

First, the desire for private counsel and the expense attended thereto can be satisfied with property which would otherwise, in all likelihood, be lost to the government. Second, whether or not the defendant has other assets, property which has been identified by the government, seized or otherwise restrained, and alleged to be subject to forfeiture is in most instances the most readily available asset with which to compensate counsel.

Finally, given the nature of the narcotics

trade, whether the individual is a narcotics kingpin like Christopher Reckmeyer or a mere courier or "mule", the assets which are subject to forfeiture are normally the only property "available" to the defendant. (See, e.g., United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985).) In fact, in countless instances property seized and alleged to be subject to forfeiture may not belong to the defendant at all; it is the property of the narcotics enterprise. (See, e.q., United States v. Moya-Gomez, 860 F.2d 706, 714-715 (7th Cir. 1988).) Nevertheless, that defendant's superior in the narcotics trafficking organization, the nominal "owner" of the property, would much prefer to see the asset used to pay counsel to defend his subordinate and ensure that person's loyalty and silence than to see it forfeited to the government.

Nearly without fail, it is claimed that the very property seized and subjected to forfeiture proceedings is that "needed to pay counsel." We encountered a systematic practice in California in which seized assets were routinely assigned to counsel to pay legal fees. (See, Franchise Tax Board v. Superior Court (McKean) 168 Cal.App.3d 970, 975, 215 Cal. Rptr. 36, 38 (1985) [such an assignment is "presumptively fraudulent"]; see also, United States v. Thirteen Thousand Dollars in U.S. Currency, 733 F.2d 581 (8th Cir. 1984); United States v. \$364,960.00 in U.S. Currency, 661 F.2d 319 (5th Cir. 1981); United States v. \$22,640 in U.S. Currency, 615 F.2d 356 (5th Cir. 1980); United States v. Currency Totaling \$48,318.08, 609 F.2d 210 (5th Cir. 1980) United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975).) The defense attorney would then seek to enforce this assignment in the criminal

proceeding by obtaining an order to return the property premised upon the defendant's asserted Sixth Amendment right to counsel of choice. When enforced these assignments all but eliminated the "res" in the forfeiture action. However, this practice was largely checked when the California Court of Appeal decided the case of People v. Superior Court (Clements), 200 Cal.App.3d 491, 246 Cal.Rptr. 122 (1988), hearing denied, Cal. Supreme Court, July 28, 1988, No. S005855.

(Clements) arose as a consolidated writ proceeding from four separate criminal prosecutions in which the judge who was presiding over the preliminary hearing of the defendant ordered the police to return seized funds ranging in an amount from approximately eighty thousand dollars (\$80,000.00) to fifteen hundred dollars (\$1,500.00)to the defendant to pay counsel. (In two of the

underlying proceedings, the court took no evidence on the issue of the reasonableness of the purported assignment of the seized assets to pay attorney's fees, the lack of other resources available to the defendant to employ counsel or the availability of other counsel. These two cases involved seized assets assigned in whole to defense counsel in amounts of forty-eight thousand nine hundred seventy-six dollars (\$48,976.00) and seven thousand nine hundred dollars (\$7,900.00), respectively. In the other two cases the court conducted an in camera hearing from which the prosecutor was excluded wherein the court purportedly entertained representations concerning the reasonableness of the assignment to pay counsel fees. The assignments in these two cases were for approximately one thousand dollars (\$1,000.00) and eighty thousand dollars (\$80,000.00), respectively.)

Relying principally upon the decision of the Fourth Circuit in Caplin & Drysdale, Chartered, the California Court of Appeal held that there was nothing in the California narcotics asset forfeiture provisions (Cal. Health & Saf. Code \$ 11470 et seq.), patterned as they are after the federal statutes, which exempted from forfeiture property necessary for bona fide attorney's fees. (People v. Superior Court (Clements), supra, 200 Cal.App.3d at pp. 497-498, 246 Cal.Rptr. at pp. 125-126.) The Court further held that the government's interest in the forfeiture of narcotics related property outweighed any Sixth Amendment right to use this property to secure counsel. (Id., 200 Cal.App.3d at pp. 498-501, 246 Cal.Rptr. at pp. 126-128.) Although not an issue in the (Clements) decision, the Court acknowledged the importance of the availability of a probable cause hearing when a claim is made

that seized or restrained assets are needed to pay counsel. (Id. 200 Cal.App.3d at p. 495, 246 Cal.Rptr. at p. 124) California law specifically provides for such a hearing. (See, Cal. Health & Saf. Code § 11488.4(g), formerly § 11488.4(h).)

Amicus curiae believes the

(Clements) case was correctly decided as

was Caplin & Drysdale, Chartered upon which

it was based. We urge this Court to ratify

these decisions as we anticipate that any

ruling in these cases premised on

constitutional grounds will necessarily

affect proceedings under California law, as

well as the federal forfeiture statutes.

Although some courts have suggested that for purposes of the Sixth Amendment attorney fee claim, there is a distinction between an in rem forfeiture action and in personam, criminal forfeiture (see, United States v. Bailey, 666 F.Supp. 1275 (E.D.Ark. 1987)), amicus curiae does

not believe that such a facile distinction would survive careful scrutiny. (See, United States v. U.S. Coin and Currency, 401 U.S. 715, 718 (1971).) Indeed, a number of courts have squarely addressed the Sixth Amendment right to counsel of choice claim in the context of an in rem forfeiture action. (See, United States v. Unit Number 7 and Unit Number 8, 853 F.2d 1445 (8th Cir. 1988); United States v. \$70,476 Dollars in U.S. Currency, 677 F.Supp. 639 (N.D.Cal. 1987), appeal dismissed, 845 F.2d 329 (9th Cir. 1988); United States v. One Parcel of Land, 614 F.Supp. 183 (N.D.Ill. 1985).) Likewise, there appears to be no reasoned basis for distinguishing between a case in which the government alleges that all or nearly all of a defendant's estate is subject to forfeiture (Caplin & Drysdale, Chartered) and that in which only particular items of property are cited

(Monsanto). If the defendant claims the asset is needed to pay counsel, and the Sixth Amendment requires that this claim be addressed, at minimum the court, prosecutor and defense will be drawn into a murky, subordinate controversy over whether the fee is reasonable (a highly subjective determination) and whether the defendant has other legitimate assets to pay counsel (a question particularly within the defendant's knowledge and concerning which the defendant can hardly be expected to be forthcoming). (See, United States v. Jones, 837 F.2d 1332, 1335 (5th Cir. 1988), petition for rehearing en banc granted; United States v. \$70,746 Dollars in U.S. Currency, supra, 677 F. Supp. at 646; United States v. Nichols, 654 F. Supp. 1541, 1559 (D.Utah 1987) reversed, 841 F.2d 1485 (10th Cir. 1988); United States v. Estevez, 645 F.Supp. 869, 872 (E.D.Wis. 1986).)

Therefore, amicus curiae believes
that if this Court should hold that the
legitimate institution of forfeiture
proceedings, in rem or in personam,
implicates the Sixth Amendment, then the
effective application of federal and
California's asset forfeiture provisions
will be seriously jeopardized and our
efforts against narcotics trafficking
severely undermined.

#### SUMMARY OF ARGUMENT

The right to counsel of choice is qualified in the first instance by the availability of legitimate means to secure counsel. The seizure or restraint of property subject to forfeiture serves a vital public interest which justifies preventing use of the property for any purpose. The restraint of property subject to forfeiture has only an incidental, non-arbitrary impact on the right to counsel of choice, indistinguishable from a host of

other circumstances. Accordingly, there is no need to weigh or balance the interests at stake. Seizure and forfeiture of criminally tainted property does not implicate the right to counsel of choice because property subject to forfeiture does not constitute the legitimate means to pay counsel. The Due Process Clause of the Fifth Amendment does not require that the "balance of forces" between the government and the accused be equalized with criminally tainted property.

#### ARGUMENT

THE SIXTH AMENDMENT QUALIFIED RIGHT TO COUNSEL OF CHOICE AND THE FIFTH AMENDMENT DUE PROCESS CLAUSE ARE NOT IMPLICATED BY THE LEGITIMATE INSTITUTION OF FORFEITURE PROCEEDINGS

The Court has the benefit of a great deal of both judicial and academic scholarship treating the consequence of forfeiture on the qualified right of counsel of choice. In addition to the decisions of the Fourth and Second Circuits

in the Caplin & Drysdale, Chartered and Monsanto cases, respectively, the Fifth, Seventh, Eighth and Tenth Circuits have rendered decisions touching on this issue. (United States v. Jones, supra, 837 F.2d 1332 [5th Cir.]; United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), modified 809 F.2d 249 (5th Cir. 1987); United States v. Moya-Gomez, supra, 860 F.2d 706 [7th Cir.]; United States v. Unit Number 7 and Unit Number 8, supra, 853 F.2d 1445 [8th Cir.]; United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988).) The academic literature is gathered and categorized in United States v. Nichols, supra, 841 F.2d at 1490-1491, n. 3.

Amicus curiae can add little to the chorus of thoughtful analysis offered by these courts and commentators. We submit brief in an effort to broaden the perspective in which the constitutional issues will be discussed. Secondly, we are

concerned that in the whirlwind of controversy which characterizes the constitutional question the deteminative issue may be obscured.

The Fourth Circuit reached, we submit, the correct conclusion when it held that "[f]orfeiture, in our view, is another of those events that may prevent a defendant from choosing his counsel but does not involve any denial of the qualified right to counsel of choice". (Caplin & Drysdale, Chartered, supra, 837 F.2d at p. 645.) However, it was the Tenth Circuit which best framed the issue when that court noted that the qualified right to counsel is implicated "only if the defendant has a constitutional right to use assets subject to forfeiture", in the first instance. (United States v. Nichols, supra, 841 F.2d at p. 1505.)

The line of this Court's jurisprudence beginning with <u>Powell</u> v. <u>Alabama</u>,

That the qualified right to counsel of choice is limited by the legitimate means to employ counsel has been presupposed by a number of courts. (Wilson v. Mintzes, 761 F.2d 275, 280 (6th Cir. 1985) ["when an accused is financially able to retain an attorney, the choice of his counsel to assist rests ultimately in his hands."]; United States v. Lewis, 759

F.2d 1316, 1326 (8th Cir. 1985) ["The Constitution recognizes solvent defendants' interest in retained counsel."]; United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) ["This Court has recognized that individuals who can afford to retain counsel have a qualified right to obtain counsel of their choice. "]; Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) ["a defendant [may] select his own counsel at his own expense."]; United States v. Burton, 584 F.2d 485, 489 (D.C.Cir. 1978) ["An accused who is financially able to retain counsel must not be deprived of the opportunity to do so."]; United States v. Inman, 483 F.2d 738, 739-740 (4th Cir. 1973) [the courts have recognized the right of "any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by the attorney of his choosing."]; People v. Holland, 23 Cal.3d

77, 86, 151 Cal.Rptr. 625, 630, 588 P.2d
765, 770 (1978) ["a defendant financially able to retain an attorney of his own choosing can be represented by that attorney . . . using any legitimate means within his resources . . . . "]

Conceding that the right to counsel of choice is subject to the "harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy" (Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J. concurring)) and that every defendant is quaranteed competent counsel by appointment if necessary (Gideon v. Wainwright, 372 U.S. 335 (1963)) the Sixth Amendment jurisprudence applicable in these cases ends. Contrary to the analysis of a number of the Circuit Courts, we do not believe any balancing or weighing of interests is therefore required. The defendant should not be heard to bargain

with property (criminally tainted) in which
the state recognizes no private title. The
only question which remains is whether the
government may constitutionally restrain
the use of property which is alleged to be
subject to forfeiture regardless of the
intended or desired use for that property.
The answer must be unequivocally yes.

Whether justified as protecting the government's interest in property which ultimately will be forfeited to it and preventing the dissipation of that property during pendency of the forfeiture proceeding (see, Caplin & Drysdale, Chartered, supra, 837 F.2d at pp. 643-646) or on the basis of the "relation back" rule which vests title to an asset in the government at the time of the offense (see, United States v. Nichols, supra, 841 F.2d at pp. 1499-1501), the government clearly has the right to restrain and prevent the dissipation of property alleged to be

subject to forfeiture during the pendency of the forfeiture proceedings.

"The government's interest in the tainted property arises from the government's power to regulate illegal activities. More specifically, the government has an interest in regulating the means and fruits of illegal activity. Laws defining contraband are one example of congressional power to create a governmental interest in property involved in criminal activity." (United States v. Nichols, supra, 841 F.2d at p. 1500.)

This Court has twice held that
the governmental interest underlying the
forfeiture statutes justifies the seizure
and restraint of a person's property
without a prior judicial determination that
the seizure is justified, to say nothing of
the ultimate question which is whether the
property is forfeit to the government.

(United States v. \$8,850 in U.S. Currency,
461 U.S. 555, 562 (1983); Calero-Toledo v.
Pearson Yacht Leasing Company, 416 U.S.
663, 680-681 (1974).)

"Pearson Yacht clearly indicates that due process does not require federal Customs officials to conduct a hearing before seizing items subject to forfeiture. . . . The government interests found decisive in Pearson Yacht are equally present in this situation: the seizure serves important government purposes; a preseizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than selfmotivated private parties." (United States v. \$8,850 in U.S. Currency, supra, 461 U.S. at 562, n. 12.)

Outside the forfeiture context,
this Court has sanctioned other types of
pretrial restraints which are found to
serve the public interest. Accordingly,
just as the government may restrain liberty
to prevent the flight of a suspect (Bell v.
Wolfish, 441 U.S. 520, 534 (1979)) or to
protect the community from further criminal
deprivations (United States v. Salerno,
U.S. \_\_\_\_, 107 Sup.Ct. 2095, 95 L.Ed.2d 597
(1987)), so, too, may the government seize
and otherwise restrain assets which are
subject to forfeiture to prevent the

dissipation of those assets or their further use for illicit purposes.

Similarly, a court may inquire into the source of bail (see, United States v.

Nebbia, 357 F.2d 303, 304 (2d Cir. 1966)), and assure itself that bail is not from an illegitimate source (see, United States v.

DeMarchena, 330 F.Supp. 1223, 1226

(S.D.Cal. 1971)). Thus, illgotten gains will not be accepted in exchange for pretrial liberty.

Such pretrial deprivations of liberty or property must, however, be imposed in accordance with the requirements of due process. Although not raised in either of the two cases before the Court, amicus curiae believes that a defendant is entitled to a reasonably prompt post seizure or restraint hearing in which the government should be required to show probable cause to believe that the property is subject to forfeiture if the defendant

claims and establishes an important need for the property, i.e., to employ counsel.

(United States v. Moya-Gomez, supra, 860

F.2d at 726-730; United States v. Unit

Number 7 and Unit Number 8, supra, 853 F.2d at pp. 1449-145.)

The restraint of property which is subject to forfeiture serves "the public interest in preventing continued illcit use of the property and enforcing criminal sanctions" (Calero-Toledo v. Pearson Yacht Leasing Company, supra, 416 U.S. at p. 679). Manifestly, such restraint has only an incidental and nonarbitrary impact on the qualified right to counsel of choice not unlike the other vagaries of economic life. Therefore, there is no call to balance the government's interest in the restraint of assets against a defendant's right to choose counsel because that right is qualified in the first instance by the availability of legitimate resources to pay

counsel. Simply stated, the forfeiture of criminal related property does not invade the recognized right to counsel of choice.

Equally, the Fifth Amendment Due Process Clause is not implicated by the restraint and forfeiture of tainted property. The "balance of forces between the accused and his accuser" (Wardius v. Oregon, 412 U.S. 470, 474 (1973) is implicated only if this Court is prepared to recognize that a criminal defendant has a right to use his ill-gotten gains to defend himself, or if it can be shown that the prosecution improperly instituted forfeiture proceedings in a deliberate effort to strip a defendant of his legitimate resouces. In the first instance, it beggars reason to believe that this Court would recognize a constitutional right to use and enjoy the proceeds of criminal activity. Second, nothing in the cases before the Court

suggest any impropriety in the targeting of the property for forfeiture. Furthermore, the mere possibility of abuse is hardly sufficient to declare a statutory scheme unconstitutional as violative of the Due Process Clause. <u>United States v. Nichols</u>, supra, 841 F.2d at p. 1508.)

\* \* \*

#### CONCLUSION

The restraint of property alleged to be subject to forfeiture does not implicate the qualified right to counsel of choice nor does it offend the Due Process Clause of the Fifth Amendment as respects the balance of powers between the government and the accused. Accordingly, the decision of the Second Circuit en banc in Monsanto should be reversed and the decision of the Fourth Circuit en banc in Caplin & Drysdale, Chartered should be affirmed.

DATED: February 1, 1989

JOHN K. VAN DE KAMP, Attorney General of the State of California

STEVE WHITE, Chief Assistant Attorney General

JOHN A. GORDNIER, Senior Assistant Attorney General

GARY W. SCHONS

Deputy Attorney General

Counsel for Amicus Curiae State of California

#### CERTIFICATE OF SERVICE BY MAIL

No. 88-454 & 87-1729

UNITED STATES OF AMERICA, PETITIONER,

v.

PETER MONSANTO

CAPLAIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

1

GARY W. SCHONS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is

110 West A Street, Suite 700, San Diego,
California 92101; that on February 3,
1989, he caused to be served a true copy
of the attached Brief of the State of
California, as Amicus Curiae in the
above-entitled matters, on counsel for
petitioners and counsel for respondents
by placing same in an envelope addressed
as follows:

Edward M. Chikofsky, Esq. 500 Fifth Avenue
New York, New York 10110

(Counsel for Respondent Monsanto)

Peter Van N. Lockwood, Esq. CAPLAIN & DRYSDALE, Chartered One Thomas Circle, N.W. Washington, D.C. 20005

(Counsel for Petitioner Caplain & Drysdale, Chartered)

Edwin S. Kneedler, Esq. Assistant to the Solicitor General Department Of Justice Washington, D.C. 20530

(Counsel for the United States of America)

Said envelope was then sealed and deposited in the United States mail at San Diego, California, with the postage thereon fully prepaid.

GARY W. SCHONS

Deputy Attorney General Special Prosecutions Unit

Subscribed and sworn to before me this 3rd day of February, 1989.

Notary Public in and for said County

My commissioner for the 112, 1211 S

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and State

NO. 87-1729 and NO. 88-43

#### IN THE

JOSEPH F. SPANIOL, JR.

FEB 15 1909

Supreme Court, U.S.

## SUPREME COURT OF THE UNITED STATES

October Term, 1987 CAPLAN & DRYSDALE, CHARTERED,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

October Telm, 1988 UNITED STATES OF AMERICA RESPONDENT

v.

PETER MONSANTO

PETITIONER

# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF

THE UNITED STATES OF AMERICA

Appellate Committee of the California District Attorneys Association

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NO.	87-1	1729	and	NO.	88-	454

### IN THE

## SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI
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FOR THE

FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF
THE UNITED STATES OF AMERICA

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties to the above consolidated cases pursuant to Rule 36(2), RULES of the SUPREME COURT of the UNITED STATES.

#### INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California. It was organized in order to utilize and coordinate the resources of the offices of district attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has decided to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California. See Rule 36(4).

In California, a civil forfeiture statute applicable to drug trafficking is in effect. California Health and Safety Code, §§ 11470 et seq. (West 1989). There is no requirement that there be a related criminal action. Id., § 11484.4, subd.(i). However, the issue of forfeiture may be tried in conjunction with the criminal action, but upon motion of either the defendantclaimant or the prosecution, the forfeiture hearing can be continued until after the criminal charge has been resolved. Id., §§ 11484.4, subd.(i); 11488.5, subd.(e). The Attorney General of the State of California or the District Attorney of the county involved is responsible for the filing and maintaining of asset forfeiture proceedings. Id., § 11488.1. If a forfeiture petition is filed, a defendant in an underlying or related criminal action who is a claimant in the forfeiture proceeding is entitled to move, unless he has already pleaded guilty or nolo contendere, for the return of the seized assets upon the ground that probable cause is lacking to believe they are subject to forfeiture. Id., § 11484.4, subd.(g)(2). Similarly, where there is no underlying or related criminal action, a claimant is entitled to a probable cause determination no sooner than 10 days after a forfeiture petition is filed. Id., §

11484.4, subd.(g)(1). Moreover, where a forfeiture petition has been filed with respect to unseized assets, the prosecuting attorney may seek protective orders. However, such protective orders (except a temporary restraining orders) may issue only after notice and hearing. It must be determined that there is probable cause to believe they are properly forfeitable. *Id.*, §§ 11484.4, subd.(b); 11492, subd.(b).

The California Court of Appeal held in People v. Superior Court (Clements), 200 Cal.App.3d 491, 246 Cal.Rptr. 122 (1988), that the constitutional right of counsel in a criminal case is not violated by denial of access to seized assets pending forfeiture proceedings. The court noted that there was statutory provision for a defendant to move for the return of seized assets upon the ground that probable cause to believe such assets were forfeitable was lacking.<sup>1</sup>

Clearly, the Association and its membership have a vital interest in urging this Court to hold that the constitutional right to counsel in a criminal case does not require that assets otherwise subject to forfeiture are exempt to the extent needed to pay legitimate attorney fees.

California Health and Safety Code § 11484.4, as it then read, did not require that a forfeiture petition be pending when the defendant in the criminal action is entitled to make a motion for return of property upon the ground of a lack of probable cause to believe the item seized is forfeitable. People v. Superior Court (Clements), supra, 200 Cal.App.3d at 495 n. 3.

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#### SUMMARY OF ARGUMENT

The basic issue in these cases is whether a defendant in a criminal case is entitled to have access to his property, which has been seized or otherwise detained by the government pending a forfeiture proceeding, in order to pay legitimate attorney fees. We contend that a defendant should not have access to such property at least where there has been a judicial determination that there is probable cause to believe that the property in question will ultimately be forfeited.<sup>2</sup> A defendant has no more right to pay a lawyer with what is believed upon probable cause to be the proceeds of criminal activities than with what is believed upon probable cause to be stolen property.

It is well settled that the interest of a person in his liberty is not unconstitutionally denied when he is subject to significant pretrial restraint where there has been a judicial determination that there is probable cause to support his detention. Similarly, the interest of a person in his property should not be deemed to be unconstitutionally denied when such property is subject to significant pretrial restraint where there has been a judicial determination that there is probable cause to support such restraint.<sup>3</sup>

#### ARGUMENT

THE CONSTITUTIONAL RIGHT TO COUNSEL IN CRIMINAL CASES IS NOT VIOLATED BY DENIAL OF ACCESS TO SEIZED OR OTHERWISE DETAINED ASSETS FOR THE PURPOSE OF PAYING ATTORNEY FEES AND EXPENSES WHERE THERE HAS BEEN A PRETRIAL PROBABLE CAUSE DETERMINATION THAT SUCH ASSETS ARE SUBJECT TO FORFEITURE

Our position is that the Sixth Amendment right to counsel in a criminal case is not violated by the denial of access to seized or otherwise detained assets for the purpose of paying attorney fees where there has been a judicial probable cause determination that the detained assets are subject to forfeiture.

This Court has held that pre-seizure notice and hearing is not constitutionally required in order for the government to seize an asset used for unlawful purposes and which is subject to forfeiture. Caldero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) On the other hand, due process of law requires that the delay between the seizure and the initiation of a civil forfeiture proceeding be justified by a balancing test, analogous to that used to determine speedy trial challenges as set forth in Barker v. Wingo, 407 U.S. 514 (1972). This test involves the weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. United States v. \$8,850, 461 U.S. 555, 564-565 (1983). In determining what test applies to such delays, this Court explained that "the Fifth Amendment claim here. . . mirrors the concern of undue delay encompassed in the right to a speedy trial." Id., at 564.

<sup>2.</sup> We understand that both the petitioner in Caplan & Drysdale and the respondent in Monsanto urge that the Sixth Amendment is violated by demial of access to seized assets in order to pay a defendant's attorney fees whether or not a pretrial probable cause determination as to forfeitability is authorized by federal statute.

<sup>3.</sup> We do not mean to imply that a probable cause determination that a defendant's property is ultimately forfeitable is constitutionally required by the Sixth Amendment. It is simply unnecessary for us as *amicus curiae* to urge that point in light of the statutory scheme in California which might be impacted by this Court's decision in the cases at bar.

Of significance, for our purposes, is the observation by this Court: "The deprivation in *Barker* - loss of liberty - may well be more grievous than the deprivation of one's use of property at issue here. Thus, the balance of the interests which depends so heavily on the context of the particular situation, may differ from a situation involving the right to a speedy trial." *Id.*, at 565 n. 14.

The dictum in United States v. \$8,850, that the "deprivation in Barker - loss of liberty - may well be more grievous than the deprivation of one's use of property at issue here" (461 U.S. at 565 n. 14), suggests the proper analysis which permits resolution of the Sixth Amendment issues raised in Caplan & Drysdale and Monsanto.

In Gerstein v. Pugh, 420 U.S. 103, 118-119 (1975), this Court confirmed the rule that a judicial hearing is not a prerequisite to prosecution by information. However, this Court held in Gerstein that a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty, specifying that an adversary hearing is not required. In so doing, this Court acknowledged that "[t]o be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense." Id., 420 U.S. at 123. Replying to the objection that "the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less protection to a person in jail than it requires in certain civil cases" (id., 420 U.S. at 125 n.27), the Court succinctly explained:

Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural

due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.

Ibid.

Subsequently, in *Baker* v. *McCollan*, 443 U.S. 137, 143 (1979), this Court confirmed: "Since an adversary hearing is not required [for the probable cause determination with respect to any significant pretrial restraint of liberty], and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." [Fn. omitted. Bracketed matter inserted.]

This Court wisely recognized in *Gerstein* "that state systems of criminal procedure vary widely [and that] [t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.*, 420 U.S. at 123.

The California Court of Appeal approved the statutory scheme, authorizing a pretrial judicial determination of probable cause to detain property subject to forfeiture notwithstanding a defendant's Sixth Amendment claims, in *People* v. *Superior Court (Clements)*, *supra*, precisely upon the ground that "[p]retrial deprivation of liberty or property on a showing of probable cause is not an unknown means of securing a compelling interest." *Id.*, 200 Cal.App.3d at 500.

If, as Gerstein teaches us, a defendant is constitutionally entitled to no more than a probable cause determination in order to justify his continued custody or subjection to some other significant restraint pending trial, it must be the case that he is constitutionally entitled to no more than a probable cause determination in order to justify detention of his property subject to forfeiture prior to the forfeiture hearing on the merits.<sup>4</sup>

#### CONCLUSION

The Sixth Amendment does not entitle a defendant to more than a pretrial probable cause determination as to the forfeitability of property seized or otherwise detained for forfeiture proceedings even though the defendant desires access to such property for the purpose of paying attorney fees and expenses.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorneys Association

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By

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<sup>4. 21</sup> U.S.C. § 853(e)(1)(B), which authorizes protective orders prior to the filing of an indictment or information, establishes criteria in addition to probable cause (assuming that probable cause is the equivalent of a "substantial probability that the United States will prevail on the issue of forfeiture") which require balancing of specified interests. Moreover, the hearing contemplated in subsection (e)(1)(B) is adversarial. Similarly, § 853(f), which authorizes warrants for the seizure of forfeitable property, requires in addition to a determination of "probable cause to believe that the property to be seized would, in the event of a conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture." Interestingly enough, the federal statute requires that a warrant pursuant to subsection (f) must be based upon probable cause, whether or not it is issues before or after the filing of an indictment or information. Subsection (e)(1)(A), which authorizes post-indictment or post-information protective orders, does not expressly require a finding of a "substantial probability that the United States will prevail on the issue of forfeiture."

It is noteworthy that the *Monsanto* panel majority concluded that notice and an adversarial hearing are constitutionally required where the question of attorney fees is implicated with respect to post-indictment or post-information restraining orders as a matter of Fifth Amendment due process or by virtue of the Sixth Amendment. The government has the burden of establishing the probability that the defendant will be convicted at trial and that the properties in question will be subject to forfeiture. *United States v. Monsanto*, 836 F.2d at 82-85 (2d Cir. 1988), *rev'd*. 852 F.2d 1400 (2d Cir.1988), *cert. granted*, No. 88-484 (Nov. 7, 1988).

Nos. 87-1729 and 88-454

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,

Petitioner,

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

PETER MONSANTO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR EUGENE R. ANDERSON, ESQ. AN AMICUS CURIAE IN SUPPORT OF UNITED STATES OF AMERICA

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## BRIEF FOR EUGENE R. ANDERSON, ESQ. AN AMICUS CURIAE IN SUPPORT OF UNITED STATES OF AMERICA\*

#### INTEREST OF THE AMICUS CURIAE

Eugene R. Anderson, Esq., is a lawyer admitted to practice in New York and Massachusetts. He is a member of the Bar of

<sup>\*</sup> Elizabeth I. Hook, a student at Pace University School of Law assisted in the preparation of this brief.

this Court. From 1961 to 1965, he was Assistant United States Attorney for the Southern District of New York, serving as Chief of the Civil Division from 1963 to 1965. Mr. Anderson was amicus curiae in Waste Management of Carolinas, Inc. v. Peerless Insurance Co., 315 N.C. 688, 340 S.E.2d 374 (1986). Mr. Anderson has written extensively on the subject of legal fees. See, for example, one New York Times article set forth in Appendix A which relates to the subject of these cases.

As a result of his experience in both government and private practice, amicus can present a view of the issues in this case that is not presented by either the government, the parties or the other amici. Mr. Anderson has carefully reviewed the briefs in these cases filed in the respective Courts of Appeals and believes that the emphasis in this brief on property rights has not been presented to this Court or to the lower courts. This brief argues that the judiciary should not create unprecedented new rights in tainted assets simply because legal fees are involved. The brief also focuses on the public's perception of the legal profession.

#### SUMMARY OF ARGUMENT

1. Economically successful defendants have no greater constitutional rights than economically unsuccessful defendants. Criminal activity does not vest property rights in those who have wrongfully acquired the property. Forfeiture provisions do not deprive criminal defendants of the use of their legitimate assets to obtain the services of the counsel of their choice. Forfeiture simply prevents defendants from using assets that never belonged to them because the assets were acquired through criminal activity. To exempt legal fees from forfeiture elevates the rights of economically successful RICO and CCE defendants above those of other defendants.

The concept of seizure and forfeiture is well established in the legal system of this country. There are two issues that distinguish these cases from other seizure and forfeiture cases. First, the statutory provisions involved in these cases strike defendants with substantial tainted assets which can be used to pay legal fees. Second, the victims in RICO cases are so far removed from the defendants as to be easily forgotten in the proceedings.

These cases are actually about property rights and not the rights of accused persons. Establishing an exemption from the forfeiture provisions when legal fees are involved puts the rights of those possessing tainted money and property above the rights of those who have none.

Common law has long established that the fruits of crime do not belong to the criminal. RICO, CCE and CFA did not change the common law; they simply established a mechanism for the disgorgement of illicit fruits. In its opening brief, Petitioner Caplin & Drysdale acknowledges that "nobody" has legal title to the assets. "[N]obody's" assets cannot be used to pay "private" lawyers.

There is no constitutional provision that permits lawyers to share in the ill-gotten gains of criminal defendants they represent. The lawyers in these cases are asking to be lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime.

2. The Sixth Amendment right to counsel is firmly established. The right to counsel of choice is not absolute. To exercise that right, an individual must have the financial resources with which to do so. Since RICO and CCE defendants have no property rights to the tainted assets, they have no financial resources with which to exercise their right to choice of counsel.

The plight of RICO defendants is being confused with the plight of the lawyers. The problem is lack of legitimate assets. Sympathy for lawyers does not justify special treatment for economically successful RICO defendants.

- 3. One of the unique features of a RICO case is that there is no victim at the station house. This fact does not call for giving special economic status to the lawyers retained by such defendants. The State of New York has enacted legislation that permits prosecuting attorneys to recover the proceeds of all felonies. If this Court permits lawyers to share in seized assets, it will not only frustrate the will of Congress as expressed in RICO, CCE and CFA, but will also adversely affect the public policy of the State of New York as expressed in its statute.
- 4. Whether a RICO, or any other, defendant is adequately represented by a public defender or court-appointed lawyer is a separate issue that should be addressed in an *appropriate* case.
- 5. The public perceives the criminal justice system as being slow, inefficient and favoring the rich and mighty. Vital to a law-abiding society is renewed public confidence in the system.

# **ARGUMENT**

I

# NO PROPERTY RIGHTS ARE VESTED IN CRIMINALS BY CRIMINAL ACTIVITY

Economically successful defendants have no greater constitutional rights than economically unsuccessful defendants. Exempting attorneys' fees from the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §1963 (Supp. IV 1986), Continuing Criminal Enterprise (CCE), 21 U.S.C. §848, and Comprehensive Forfeiture Act (CFA), 21 U.S.C. §853, statutes invests property rights in criminal defendants which these defendants do not have. These cases are about property rights, not the constitutional right to counsel in criminal cases. They are about legal economics, not constitutional rights. At issue is the right of the public to deprive criminals of the fruits of crime, not potential prosecutorial misconduct.

Seizures and forfeitures are ingrained in our laws and, equally important, in our culture. Since the days of our Founding Fathers, the United States Customs Service has impounded alleged contraband. Firearms, alcohol and tobacco, to mention just a few of the multitude of products, have been and regularly are, impounded. The warehouses of the United States Customs Service and the vaults of the New York City Police Property Clerk are full. The United States Attorney for the Southern District of Florida probably has more ships impounded than are in many of the world's navies and enough airplanes to start a medium-sized airline.

Pretrial seizure has been ordinary, usual, well-known and well-accepted for generations — long before enactment of the RICO, CCE and CFA statutes.<sup>2</sup> Two things distinguish RICO, CCE and CFA cases. First, these statutory provisions strike "big guys" who can afford to use ill-gotten assets in their possession to pay legal fees. Note carefully, the plea in these cases is not for a "lawyer," but for a "private" lawyer.<sup>3</sup> Second, the defendants in RICO prosecutions are remote from their victims and from their crimes. There is no battered victim at the station house to demand that her purse or his wallet be returned. The victim is the public; it is wrong implicitly to assume that there is no victim at all, and therefore no compelling government interest.<sup>4</sup>

<sup>&</sup>lt;sup>1</sup> Opening brief of Respondent, Monsanto, in No. 88-454 (cited herein as "Monsanto Br."), at p. 12. Fuentes v. Shevin, 407 U.S. 67 (1972), changed procedural rules. It did not change property laws.

<sup>&</sup>lt;sup>2</sup> Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

<sup>&</sup>lt;sup>3</sup> Brief of Petitioner, Caplin & Drysdale, Chartered, in No. 87-1729 (cited herein as "C&D Br."), at pp. 10, 11, 39, 42, 45; Monsanto Br. pp. 32, 36, 43, 45.

<sup>\*</sup>In his opening brief in No. 88-454, Respondent Monsanto distinguishes proceeds of a bank robery from RICO and CCE proceeds. Stating that because the bank and its depositors are "wrongfully deprived owners" having a "common law right to the return of their property," Respondent claims that "the government has a compelling interest in obtaining...return [of the assets]

(Footnote continued)

That these cases are about property and not the Constitution is concisely and eloquently set forth in an "Op-Ed" article which appeared in *The New York Times* of December 30, 1988, a copy of which is set forth in Appendix B, to which the Court's attention is respectfully drawn. (See also Queenan, Rico Strikes Again!, Barron's Nat'l Bus. & Fin. Weekly, Dec. 12, 1988, at 8.) The indifference to the rights of people characterized by this article underscores the fact that these cases are about property rights and not the rights of accused persons. The decision of the en banc panel of the Fourth Circuit implicitly recognized that the most serious pre-trial deprivation of all — deprivation of liberty — is constitutional. The prospect of "private" legal fees — or the loss thereof — does not justify a change of constitutional principles. If these cases were titled In re Drexel Burnham Lambert & Co. they would more clearly illustrate the "non-issues."

To establish an exemption from the forfeiture provisions when legal fees are involved puts the interests of those possessing disputed money and property above the rights of those who have none. It is not a deprivation of constitutional rights to prevent a smalltime burglar from using the property he allegedly has stolen to

that plainly outweighs the robber's claim to use...[them] for any purpose, even to hire an attorney." Monsanto Br. p. 37. This concession does not square with Monsanto's earlier contention (Monsanto Br. p. 31) that the right to counsel is among the most fundamental of rights. Where is the line drawn between bank robbers and stock manipulators? The right to counsel is not so fundamental that it permits the use of the fruits of crime to pay lawyers. The plea for medical care for the defendants' children (Monsanto Br. p. 17, citing *United States v. Rogers*, 602 F.Supp. 1332, 1348 (D. Colo. 1985)), while touching, fares no better. Stealing for food, shelter, medical care and lawyers is not condoned. The long and short of the matter is that neither Monsanto nor Reckmeyer ever had common law property rights.

pay his defense lawyer. A defendant with available funds can use his assets to post bail rather than to pay legal fees. The bail vs. lawyer dilemma is precisely the same issue as that suggested by Petitioner, Caplin & Drysdale, [hereinafter Petitioner] and Respondent, Monsanto, [hereinafter Respondent] in these cases. No one would contend that court-imposed bail deprives a defendant of constitutional rights because he has chosen pretrial freedom over a higher-priced lawyer. Following their logic, defendants should be permitted to use disputed assets to post bail.

Does an alleged criminal who is caught reaching into the cash register have a constitutional right to take out just enough to pay a lawyer? Should an accused murderer who is the beneficiary of the victim's life insurance policy be able to demand immediate payment of just enough of the insurance proceeds to pay legal fees? Should a defendant be allowed to travel without bail to Switzerland to withdraw funds from a secret bank account if the money is to be used to pay a lawyer? The answer to all these questions, as it is in the instant cases, is no.

The law routinely permits property held by criminal defendants to be frozen. Tax liens and creditors' liens may tie up assets. A wife seeking a divorce may decide that she, not her husband's lawyer, should get the defendant's assets, and, if she can make the required evidentiary showing, can obtain a court order to prevent her husband from disposing of property. Other "[p]urely private predicaments may leave a defendant without the counsel of his choice."

Regardless of how many times it is said that the government is depriving the defendant of the right to pay a lawyer it does

<sup>5</sup> In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 643 (1988).

<sup>&</sup>lt;sup>6</sup> Petitioner in No. 87-1729, Caplin & Drysdale, Chartered, seems to acknowledge that the legal fee issue really pinches because of "white collar" crimes. C&D Br. pp. 35, 44, 45.

In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 646.

<sup>&#</sup>x27; In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 645.

<sup>°</sup> C&D Br. pp. 10, 38, 39, 41, 42.

not become true. Defendants who have "undisputed assets" are not deprived of such rights. Defendants with illicit assets do not have any right to those assets and this is not because of anything the government does or does not do. Illicit assets — whether cash or stolen Van Goghs — do not belong to the defendants and cannot be used by defendants. The presence of the government in these cases is irrelevant. The government cannot deprive the defendants of something they do not have. It is not the government that makes a "beggar" of the defendant or renders a defendant "indigent," it is his or her lack of undisputed assets. This Court should, and must, apply the common law to these cases. RICO, CCE and CFA did not change the common law. As Justice Oliver Wendell Holmes once wrote, "upon this point, a page of history is worth a volume of logic." 16

Repeated reference to "the defendant's assets" or "his or her assets" ignores the facts.

Petitioner, Caplin & Drysdale, would have this Court believe that the question is a "fiscal" one. It is not. The fruits of crime do not belong to RICO defendants any more than they belong to muggers, bank robbers or stock manipulators. Whether the government makes or loses money is completely irrelevant. Caught in the dilemma of trying to justify a RICO defendant's use of illicit assets, Petitioner Caplin & Drysdale acknowledges that "nobody" has legal title to the assets. C&D Br. p. 40. For this reason alone the Petitioner's sophistry fails. "Nobody's" assets are not the RICO defendants' assets. Nobody's assets cannot be used to pay "private" lawyers.

Because the defendants have nothing when they have illicit assets, the argument about equities and "balance of hardships" is a non-starter.<sup>23</sup> Pickpockets do not enjoy such equities and

<sup>&</sup>lt;sup>10</sup> The potential for prosecutorial misconduct is no more present in these situations than in many others. For example, a prosecutor can grant immunity, decide to indict or not to indict, decide to charge a lesser offense, etc. Even the most aggressive prosecutor cannot pick the lawyer for an indigent defendant nor set the compensation for that lawyer.

<sup>&</sup>quot; In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 645, 646.

<sup>&</sup>lt;sup>12</sup> C&D Br. p. 12, or "pauper" C&D Br. p. 20.

<sup>13</sup> C&D Br. pp. 19, 41; Monsanto Br. pp. 4, 6, 34-35.

<sup>&</sup>quot;The "purely private predicament" of no legitimate assets was not created by the government as contended by Monsanto. Monsanto Br. p. 35, fn. 19.

<sup>&</sup>lt;sup>13</sup> "Forced indigency" (C&D Br. p. 23) is a terrible thing, but not as reprehensible as living off the fruits of illicit acitvity.

<sup>18</sup> New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

<sup>1</sup>º C&D Br. pp. 11, 12, 24; Monsanto Br. pp. 3, 6, 11, 36, 38, 41, 48.

<sup>18</sup> C&D Br. p. 28.

<sup>&</sup>lt;sup>19</sup> In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 645. Petitioner in No. 87-1729, Caplin & Drysdale, Chartered, contends that since lawyers have "historically" been permitted to receive tainted assets they should be permitted to continue to do so. C&D Br. p. 45. The argument for the continuation of the practice boils down to "Two Wrongs Make a Right."

<sup>&</sup>lt;sup>20</sup> Petitioner's concern for the resource needs of "public defenders" (C&D Br. pp. 33-34, 45), while commendable, is a different issue for a different case.

<sup>&</sup>lt;sup>21</sup> Respondent Monsanto, in No. 88-454, asserts that RICO and CCE defendants have "colorable" title to the questioned assets. Monsanto Br. p 37. But whatever color there is to the title is extinguished when the defendant is convicted. The assets are then not "taken away," but are merely proven not to have belonged to the defendant after all. Preconviction there is, at best, a procedural issue. *Fuentes*, 407 U.S. 67.

<sup>&</sup>lt;sup>22</sup> Minimizing the government's interests as "merely those of the United States" (In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 646) does not exalt the defendant's possessory interest to the status of ownership.

<sup>23</sup> C&D Br. p. 15.

neither should RICO defendants.<sup>24</sup> Some lower courts have been drawn into a morass that will involve the courts in hearings akin to matrimonial proceedings to determine the amount of support a spouse and children should receive.<sup>25</sup> Take these cases out of the realm of high finance and the issues vanish. The "hardship" plea is completely devoid of substance because the defendants have absolutely no "right" to use illicit assets for any purpose whatsoever. The entire argument boils down to Willie Sutton's justification for robbing banks: That is where the money is.

Petitioner Caplin & Drysdale confuses the issue by referring to "defendant's vital interests in having food, shelter, medical care and defense counsel pending trial." This argues for a license to steal, which no defendant — no matter how needy — has. The plea for "legitimate living expenses" is nonsense. It is the source of the funds, not the character of the expenditures, that is in issue. It is no booky's lavish charitable contributions were

legitimate; his source of funds was illegitimate.<sup>29</sup> The argument is pure nonsense and it ignores the public's interest.<sup>30</sup>

If the courts are permitted to legitimize expenditures of tainted assets, to whom will persons with claims to those assets look if they can establish a "right, title or interest superior" to the defendant? Petitioner, Caplin & Drysdale, and Respondent, Monsanto, are not seeking a narrow statutory construction; they are seeking an unprecedented change in our property laws. The Court should not cleanse tainted assets even though they are going to pay a lawyer. If the courts give "permission" to use assets (Monsanto Br. p. 30, fn. 15) with no provision for "recapture," the courts will both create new property rights where none have heretofore existed and deprive the legitimate owners, if any, of their rights.

There is no constitutional provision permitting lawyers to share in the ill-gotten gains of criminal defendants they represent. In these cases lawyers are asking to be lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime. No other segment of our society would dare publicly to ask for a share of the "take" from criminal activity.

#### П.

# THESE CASES DO NOT RAISE A SIXTH AMENDMENT ISSUE

The Sixth Amendment right to counsel begins and ends with Gideon v. Wainwright, 372 U.S. 335 (1963) and the cases cited in In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 643.

<sup>&</sup>lt;sup>24</sup> United States v. Monsanto, 852 F.2d 1400, 1405 (2d Cir. 1988). The word "may" in Section 853(e)(1)(A) should not be read to permit the courts to give the defendant property rights in illicit assets the defendant would not otherwise have.

<sup>&</sup>lt;sup>28</sup> Monsanto, 852 F.2d at 1408-1409.

<sup>&</sup>lt;sup>26</sup> C&D Br. pp. 8, 12, 19, 20, 25, 26, 27, 30, 32. If the "food, shelter, medical care" plea was made below it apparently escaped the attention of Judge Wilkinson who wrote "no one would argue that the government must allow a defendant to use contested assets to purchase most categories of consumable services or goods." In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 644.

<sup>27</sup> C&D Br. p. 9; Monsanto p. 21.

<sup>&</sup>lt;sup>28</sup> Petitioner, Caplin & Drysdale, Chartered, acknowledges that defendants should not be permitted to make "unlawful expenditures." C&D Br. p. 19.

<sup>&</sup>lt;sup>28</sup> Judge Winter in Monsanto, 852 F.2d at 1408, confused "ordinary lawful expenditures" with the use of fruits of crime.

<sup>&</sup>lt;sup>20</sup> The plea for just a little bit of the illicit assets (C&D Br.pp. 23-24, 41-42) fares no better. The public has an overwhelming interest in depriving all defendants – RICO defendants and accused bank robbers – of illicit assets. Permitting just a little use of tainted assets puts the courts on a slippery slope.

<sup>&</sup>lt;sup>31</sup> Monsanto Br. p. 13.

No amount of hair-splitting or searching to see "how many angels can dance on the head of a pin" should be permitted to confuse or obscure the constitutional principle set forth in Gideon. Respondent in No. 88-454, Monsanto, concedes that "... the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it...." Monsanto Br. p. 32. Since RICO and CCE defendants have no property right to the tainted assets, they are in exactly the same position as defendants who do not have the financial resources to exercise their right to choice of counsel.

Petitioner, Caplin & Drysdale, and Respondent, Monsanto, have made an implicit assumption that the manufactured conundrums in these cases are of someone else's making, e.g. that RICO defendants are innocent bystanders caught between the American Bar Association and the Constitution<sup>22</sup> or that lawyers cannot be bona fide purchasers for value.<sup>33</sup> Lawyers can ethically take credit risks and, in fact, go further sometimes, taking an assignment of bail money thus assuming the risk that the defendant will flee.

The proposed American Bar Association Model Codes of Professional Responsibility and Professional Conduct do not have a constitutional dimension. Petitioner Caplin & Drysdale moves with ease from the proposition that RICO defendants should not be punished to the proposition that lawyers should not be punished. (C&D Br. p. 31; Monsanto Br. p. 23). It is not "punishment" (C&D Br. pp. 25, fn. 13, 40; Monsanto Br. p. 37, fn. 20) to leave a RICO defendant without assets he or she does not legitimately own. There is no issue in the cases about punishment of lawyers; it is a red herring.

Having placed RICO defendants in a helpless and hapless situation, their advocates then look to the courts to bail them out. The problem in these cases is no "legitimate assets." The court has already solved that problem as to *all* indigent defendants.

In addition, the plight of RICO defendants is being confused with the plight of the lawyers. Of course, there is sympathy for a lawyer who takes a bum check, but so is there sympathy in that situation for "doctors" and "grocers." Caplin & Drysdale, Chartered, was victimized by Mr. Reckmeyer, who was somewhat aided by their view that an "historic" practice exists permitting criminal defense lawyers to accept tainted assets. Genuine sympathy for victims such as Caplin & Drysdale does not entitle the legal profession to special treatment.

Lawyers are not unique in that they are not bona fide purchasers. <sup>37</sup> Pawnbrokers are similarly situated. The problem is not created by RICO, CCE and CFA, but would exist even without those statutes. It is a problem of no "legitimate assets." <sup>38</sup> It does not justify special treatment for RICO defendants.

<sup>32</sup> C&D Br. p. 36.

<sup>33</sup> C&D Br. p. 31.

<sup>&</sup>quot;Ethical problems (C&D Br. p. 35) are exacerbated, not solved, by permitting lawyers to be paid from illicit assets.

<sup>&</sup>lt;sup>м</sup>С& Вr. р. 30.

<sup>&</sup>lt;sup>36</sup> C&D Br. p. 45. Petitioner Caplin & Drysdale argues for a presumption that legal fees in RICO cases are being paid from tainted assets. There should be no such presumption. The statute requires some level of knowledge. It is wrong to say that criminal lawyers can never be paid because of this presumed guilty mind. Petitioner and Respondent are asking this Court to rule that there is no Constitutional way for the Legislature to say that no one can get property rights in tainted assets if the result of such legislative action impacts legal fees.

<sup>37</sup> C&D Br. pp. 31, 34.

<sup>34</sup> In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 645.

## III.

# THE ABSENCE OF A "SPECIFIC" VICTIM IN RICO CASES SHOULD NOT ACCORD SPECIAL TREATMENT FOR RICO DEFENDANTS

The victims of crimes underlying RICO prosecutions are frequently numerous, unknown, nameless and faceless. The defendants are remote from their crimes physically and temporally. The victim of a street mugging is sufficiently "real" to make it unthinkable that the alleged mugger could use the contents of the victim's wallet to pay a lawyer. A distinguishing feature of RICO is that there is no victim at the station house. This fact does not serve to distinguish RICO defendants from others. It certainly does not call for giving special economic status to the lawyers retained by such defendants.

 to freeze assets which were alleged to have been obtained through fraud, bribery and corruption upon a showing of a "substantial probability" of successful prosecution.)

A decision by this Court on constitutional grounds permitting lawyers to share in seized assets would not only frustrate the will of Congress as expressed in RICO, CCE and CFA, but also adversely impact the public policy of the State of New York as expressed in its statute.<sup>40</sup>

## IV.

THE ADEQUACY OF COURT-APPOINTED COUNSEL TO PROVIDE THE CONSTITUTIONAL GUARANTEE OF A FAIR TRIAL IS A SEPARATE ISSUE THAT SHOULD BE ADDRESSED, IF AT ALL, AS TO ALL INDIGENT DEFENDANTS IN AN APPROPRIATE CASE

Petitioner and Respondent argue that depriving a RICO defendant of the opportunity to retain counsel of his choice with "experience, talent and investigative resources" seriously undermines his ability to defend himself. They do not extend their plea to those RICO defendants who are economically unsuccessful. If representation by a public defender or court-appointed lawyer is inadequate for RICO defendants, that is a separate issue that should be addressed by the Court in an appropriate case. If RICO defendants are entitled to a better defense than presently provided by public defenders, then so too are indigent defendants in other cases.

<sup>3</sup>º See, District Attorney of Queens County v. McAuliffe, 129 Misc.2d 416, 493 N.Y.S.2d 406 (1985), in which the defendants had extorted \$150,000 from an 84-year-old widow: Following arrest, only \$85,000 in cash and property remained of the total sum extorted and the court granted a preliminary injunction preventing use of the assets, citing the substantial likelihood that there would be nothing left of the a sets to restore to the victim if there was a conviction.

<sup>\*</sup> The State of California has a statute even more similar to the federal statutes, Cal. Health & Safety Code § 11470. In *People v. Superior Court*, 200 Cal. App. 3d 491, 246 Cal. Rptr. 122 (1988), the court upheld the constitutionality of the statute.

<sup>&</sup>quot; C&D Br. p. 11.

<sup>42</sup> C&D Br. p. 44.

Alleged inadequacies of public defenders and court-appointed counsel are not grounds for giving special treatment to defendants who are in possession of substantial amounts of property when arrested.

The adequacy of counsel is not a decision this Court should make in the abstract. There should be no general presumption that all public defenders are inadequate. To do so would open the floodgates for appeals alleging inadequate representation by defendants represented by public defenders. The Court should only judge the adequacy of counsel in a case in which an identified client has received or is threatened with receiving inadequate representation.<sup>43</sup>

Petitioner charges that the adversarial process — necessary to prevent abuse by the government — would be seriously threatened by preventing lawyers from taking payments from allegedly illegal assets. The implication is that the adversarial process need not be safeguarded for those who cannot afford high-priced lawyers. These cases are not appropriate cases in which to decide questions related to the adequacy of court-appointed counsel or the "imbalance of powers between the government and criminal defendants."

V.

LAWYERS SHOULD NOT BE PRINCIPAL AND LAWFUL BENEFICIARIES OF ILLEGAL GAIN FROM RACKETEERING ENTERPRISES AND FROM ORGANIZED CRIME

The criminal justice system is in a sorry state. The public perceives it as being slow, inefficient and favoring the rich and mighty. Vital to a law-abiding society is renewed public confidence in the system.

If lawyers are widely perceived to be partners in crime with those they are defending, the system will be even further corrupted. The Fourth Circuit recognized this, stating in its en banc opinion that "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture. Public cynicism and distrust of the legal system might grow as citizens watch huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege." In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 649.

From a public policy standpoint, the public must be convinced that the system is fair and applies equally to all citizens. Lawyers, officers of the court, must be seen to be supporting the administration of justice. The profession should not be perceived as pleading for special treatment for a very narrow class of defendants; a class distinguished from other defendants solely because it has the capacity to use allegedly tainted assets to pay substantial legal fees.

If the public sees special treatment accorded not only to the wealthy, but also to those involved in organized crime activities, it will lose its already shaky confidence in the American criminal justice system.

<sup>&</sup>quot;The Fourth Circuit noted the fact that "[t]here exist no grounds for a constitutional presumption of incompetence on the part of appointed counsel" (citing United States v. Cronic, 466 U.S. 648 (1984)). Rather, the Court suggested that "[i]n a specific case in which a defendant receives ineffective assistance at trial, he can challenge his conviction on that well-established basis" (citing Cronic, supra; Strickland v. Washington, 466 U.S. 668 (1984)). In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 647. Neither party has done so here. While Respondent Monsanto in No. 88-454 moved for a mistrial in his criminal trial, that motion was based upon the ruling by the Second Circuit "that he had been deprived of his right to retain private counsel out of the assets restrained by the government (Tr. 14224-44)." Monsanto Br. p. 10.

<sup>&</sup>quot; C&D Br. p. 43.

# CONCLUSION

In No. 87-1729, Caplin & Drysdale, Chartered, the decision of the Court of Appeals for the Fourth Circuit en banc should be affirmed.

In No. 88-454, Peter Monsanto, the decision of the Court of Appeals for the Second Circuit en banc should be reversed.

Respectfully submitted,

Eugene R. Anderson, Esq. 666 Third Avenue New York, New York 10017— (212) 850-0700 Pro Se

February 22, 1989

APPENDIX A

### APPENDIX A

Title:

Use Tainted Cash to Pay Lawyers?

Author:

Eugene R. Anderson

Publication: The New York Times

Date:

Tuesday, March 8, 1988

Page:

A31

No constitutional provision permits lawyers to share in the ill-gotten gains of the criminal defendants they represent. That simple, straight forward proposition should be self-evident.

Yet many defense lawyers and even bar associations, including the Association of the Bar of the City of New York, have asserted that prosecutors and courts should not be able to use two Federal laws, the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Forfeiture Act of 1984, to freeze a defendant's assets that may have been received illegally. The reason: Defense lawyers want to make first claims on the money to pay their fees.

Moreover, these lawyers say that the constitutional right of every defendant to a lawyer is jeopardized if the Government can freeze allegedly tainted assets. This line of reasoning is a red herring. It is not necessary to use ill-gotten gains to pay lawyers. The right to counsel is a firmly imbedded constitutional principle. Wealthy defendants are entitled to a lawyer — but no better or wiser a lawyer than the penniless are entitled to.

The real issue is the extent to which lawyers can be principal and lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime. No other segment of our society would dare to ask publicly for a share of the take from criminal activity. Some defense lawyers, by arguing that they should be paid up front from the allegedly tainted sums, shame the legal profession. They don't want to take the credit risk that their client might not be able to pay them if the client's money is found to have been gotten illegally.

Defense lawyers cannot ethically take cases on a contingent fee basis, but they can take credit risks. Other lawyers, who bring class actions in securities cases and those who take on personal injury cases on a contingent fee basis, are prepared to take the risk of losing millions of dollars on meritorious but ultimately unsuccessful civil cases. In other professions, businessman also take credit risks. It is not unconstitutional to ask criminal defense lawyers to live by the same rules that apply to others.

Freezing a criminal defendant's assets is not a new legal concept. A wife seeking a divorce may decide that she, not her husband's lawyers, should get the defendant's assets, and, hence, obtains a court order preventing her husband from disposing of those assets. For years, the Internal Revenue Service has had the power to stop a defendant from transferring his assets. A defendant could decide to use his assets to post bail rather than to pay legal fees, and no one would suggest that court-imposed bail deprives a defendant of constitutional rights.

Does an alleged criminal who is caught reaching into the cash register have a constitutional right to go ahead and take out just enough to pay a lawyer? Should an accused murderer who is the beneficiary of the victim's life insurance be able to demand immediate payment of the insurance policy to pay legal fees? Should a defendant be allowed to travel without bail to Switzerland to withdraw funds from a secret bank account to pay a lawyer? Should a defendant be allowed to use the courts to sue others in the criminal enterprise who owe him money if the illicit proceeds will go to pay a lawyer?

Fortunately for criminal lawyers, the courts in the United States Court of Appeals for the Second Circuit have permitted the defendant to dip into allegedly tainted funds, but only to the extent of the regular fees established for lawyers who represent indigent defendants. Those fees satisfy our constitutional mandate.

Wealthy defendants do not merit special constitutional protection and neither do economically successful criminals. If court-appointed counsel is not sufficient to provide the constitutional guarantee of a fair trial, then that problem should be addressed. But we don't solve that problem by giving special treatment to defendants who, through illegal means, have gotten their hands on a lot of money.

The criminal justice system is in a sorry state. But if criminal defense lawyers are widely perceived to be partners in crime with those they are defending, then the system will be even further corrupted.

APPENDIX B

### APPENDIX B

Title:

Drexel: Hanged Without a Trial

Author:

Joseph Nocera

Publication: The New York Times

Date:

Friday, December 30, 1988

Page:

A11

You know that old saw about how, as a society, we can't afford to impinge on the constitutional rights of some obvious rat because it could eventually erode the rights of all of us?

How—to cite the most common example—the Government can't censor pornographic magazines because that could be the first step to censoring, say, the *New Yorker*? How our liberties and rights and guarantees as citizens are so fragile that they must be defended at the very fringes of society—at Nazi rallies and mob trials?

Until last week, I never put much stock in that particular saw, seeing it mainly as an example of civil libertarianism gone amok, a Chicken Little theory that denied both reality and common sense.

Then, last week, the giant investment banking firm of Drexel Burnham Lambert settled with the Government on the eve of being indicted. Now everything looks a lot different.

The club the Government used to bludgeon Drexel into submission—causing the firm to ante up to \$650 million and plead guilty to six felony counts rather than face indictment—was RICO, the Racketeer Influenced and Corrupt Organization Act.

If "racketeer" conjures up visions of gangsters, if should; although the definition of a racketeer-influenced organization is wonderfully broad, at least from the point of view of an ambitious prosecutor, there is no question that the legislation was intended to put the mob out of business. The argument was made that the Justice Department needed a truly onerous weapon in order to have a chance in the fight against organized crime, and that RICO was that weapon.

How onerous is this law? Extremely. Anyone convicted under the statute faces, in addition to lengthy prison terms, the prospect of triple damages, the forfeiture of all illegal profits (plus interest) and so on. No problem with that, of course; people convicted of serious crimes, whether mobsters or investment bankers, ought to face serious penalties.

No, the problem with RICO is the extraordinary amount of punishment it exacts before anyone is convicted. Merely by bringing the indictment, the Government is allowed to immediately impound all the defendant's significant assets on the grounds that these assets will be turned over to the Government anyway once the guilty verdict is in.

This is an astounding power for prosecutors, for it gives the Government the ability, quite simply, to put a company out of business.

This is not an exaggeration. This past August, the Government brought a RICO indictment against a securities firm called Princeton/Newport Partners. Although prosecutors sought less than \$500,000 in illegal profits, they wanted a bond of nearly \$24 million! Because, like any securities firm, Princeton/Newport Partners need capital in order to function, the mere fact of the indictment forced it to liquidate.

Remember, now, there has been no trial. Nobody has been found guilty of anything. But the firm is finished, ruined by the financial terms of RICO and the stigma of being labeled a "racketeer."

I do not mean this to be a brief for Drexel. It seems to me quite plausible that the firm committed the crimes it has been accused of. But there is something fundamentally wrong when Drexel's pre-indictment options were either to settle or be put out of business. Getting the chance to fight for its honor in court was never part of the equation. Drexel has already been found guilty—not by a jury but by the United States Attorney.

What is offensive about the law is this: It presumes guilt. In so doing, it violates one of the civil liberties we hold most dear as a society—namely, that we are innocent until proven guilty in a court of law.

RICO makes a mockery of this right. Of course, no one seemed to be bothered by this trampling of basic rights when it was "only" the basic rights of mobsters that were at stake. But now the victims are more "respectable"; consequently, there is growing sentiment that the law should be rewritten by Congress.

Great, except the rewriting the business community has in mind would still allow RICO to trample on the rights of mobsters, while protecting those in the securities industry. One would have hoped that the securities industry would see now that the old saw has some validity after all. First it was mobsters, then securities firms. Who will be next?

Don't rewrite RICO. Abolish it. The Chicken Littles got this one right: When you violate the rights of mobsters, you violate the rights of us all.